United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-7145

ORIGINAL

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,

Plaintiffs-Respondents,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Defendants-Appellants.

B
P/S

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

Vol. 2-239a to 422a

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Plaintiff's Appendix N - Alternatives to Layoffs

ALTERNATIVES TO LAYOFFS

by

Edith F. Lynton

Based on Conferences held by

THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS

April 3 - 4, 1975

Eleanor Holmes Norton
Chair

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PREFACE

The American economy stands at one of the most critical points in the nation's history. The character of the economy itself appears to be undergoing a change that is both a function of dramatic international developments and accumulated national problems. An increasing tolerance of high unemployment is the chief by-product in human terms.

Most troubling is the poverty of national responses, which continue to look to remedies developed largely out of the Great Depression. Devastating as that experience was and relevant as many of its remedies still are, they can hardly take us the full way out of today's more complicated economic problems.

This report is an exploration designed to provoke discussion and action beyond the more traditional remedies to unemployment. While the Commission regards a full employment policy as the only acceptable answer to unemployment in the long run, we believe the country has an obligation to seek short-term remedies for unemployment. Unemployment insurance is just such a remedy that has long been accepted as a way to cushion joblessness. But we have used unemployment insurance almost exclusively to subsidize unemployment. One of the proposals in this report, for example, calls for the use of unemployment insurance to

subsidize work-sharing so that a worker on a shortened work week would be subsidized on the day he is without work, thereby putting a premium on working instead of unemployment. The Commission believes that work-sharing subsidized with unemployment insurance appears to be one of the most promising and practical alternatives to unemployment. The fact that this and other alternatives have not been more vigorously investigated or pursued is itself a comment on the state of the search for new policies to mitigate unemployment.

This document discusses this alternative and others as they were developed at a working conference on alternatives to layoffs in the spring of 1975. The conference was part of Commission efforts to develop approaches within its mandate to prevent and remedy discrimination against minorities and women. Our purpose was to explore the technical aspects and policy implications of layoff alternatives so that Commission policy would be both fair and practical. It soon became apparent that this subject has ramifications well beyond discrimination and Commission objectives. Because what is involved goes to overall manpower and employment policy, we are therefore making this report available to the public.

Eleanor H. Norton

September, 1975

Eleanor Holmes Norton
Chair

Plaintiff's Appendix N - Alternatives to Layoffs

INTRODUCTION

As the 1974-75 recession deepened and unemployment rose to an alarming post-war high, the New York City Commission on Human Rights became increasingly concerned that the gains made during the past decade toward equalizing job opportunity for minorities and women would be nullified. Unemployment in this recession, as in all prior periods of economic decline, has been the unequal burden of minorities and women, because layoffs, whether in unionized or non-unionized settings, tend to follow seniority. Currently, disproportionate joblessness has fallen again on those least equipped to sustain it, and threatens to perpetuate the inequality of opportunity that has been an historic characteristic of the national labor market. To allow this to happen in 1975 is even more intolerable than in the past. Through arduous efforts made under affirmative action in recent years more minorities and women have only recently been included in stable full-time and better-paying jobs, and thus are for the first time a part of the labor force that offers greater security and advancement opportunity.

To date, most of the concern with this problem has focused on the legal conflict between the principles of affirmative action and of seniority. In the Commission's view, any resolution of the conflict between these two principles that takes the form of simply shifting the burden of unemployment from one group of workers to another is undesirable and inequitable.

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The current conflict between affirmative action and seniority, moreover, must be recognized as a transition phenomenon. When all job seekers have enjoyed equal access to work opportunities long enough, the application of seniority rules to employment decisions will no longer manifest a significant disparate effect on the basis of race or sex.

The fundamental problem, in the Commission's view, resides in the conventional assumption that unemployment is a necessary consequence of the shifts in the level of production in a free economy. The Commission rejects this assumption on the basis, among others, of the experience of other Western capitalist nations. It is time this country became as creative in exploring all possible alternatives to layoffs to maintain a higher rate of employment. The Commission conference and this document seek to provide a basis for serious exploration of cost-saving alternatives adapted to the American situation and economy. The utilization of such alternatives, the Commission believes, would not only preserve the vulnerable jobs of minorities and women in this current recession, but could have implications extending well beyond their rights and immediate national economic problems. The Commission shares the view expressed by the National Commission for Manpower Policy that American society needs to take a fresh look at its manpower policies and develop more humane and less costly ways to deal with cyclical or structural economic change. It can no longer be considered tolerable in a developed society to allow individuals to become the indiscriminate casualities of a fluctuating

economy. New strategies are needed to make full employment policy a national reality.

Recognition of unemployment as a problem that demands public attention and national remedies was one of the major achievements of The New Deal. But what is surprising in a dynamic society is that the two principal developments of the 1930s designed to cushion the impact of unemployment, Unemployment Insurance and Public Works Programs, are today still the only national strategies, and both remarkably unaltered in design and application. The urgent need is to transform national policy from one of mitigation of some of the economic hardship of job loss to one of providing an assurance of continuous full employment. First priority for the nation is, of course, achieving full employment. Many Western European countries have made marked advances in this direction through a great diversity of public policies, including active labor market policies that even go as far as requiring work-sharing in lieu of layoffs.*

Against this background of immediate and longer range concerns, the Commission determined to stimulate thinking about the alternatives to layoffs. The ability of the city government earlier in this recession to minimize layoffs by negotiating with municipal unions for a temporary waiver of days of paid vacation, early leaving time and other

*Beatrice G. Reubens, The Hard-to-Employ: European Programs, Columbia University Press, 1970.

perquisites reinforces the Commission's belief that methods other than wholesale layoffs can be found, especially in areas of employment endowed with greater flexibility. To explore the relative merits of various alternatives, and their applicability to different businesses and industries, the Commission called two full days of conferences. The focus of the conferences was on voluntary action to avoid or minimize layoffs. Discussion of governmental action was confined to those actions that would stimulate voluntary experimentation with alternatives. Nevertheless, the participants recognized that alternatives to layoffs are only short-term remedies both to eliminate some of the continuing inequity based on race and sex and to diminish total unemployment.

Two carefully selected groups* were invited to participate, including leaders in business, industry, national labor unions, mediation and arbitration experts and legal scholars and economists. Business and labor participation ranged from representatives of industries that never have experienced layoffs to those where change in the size of work force is a long-term and chronic problem. The conference discussions included detailed analyses of actual experience, assessments of the theoretical applicability of this experience to other industries, as well as options not yet tested at all, or to any significant extent.

*A list of participants is appended.

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Discussion was informal and free-flowing, but to stimulate and focus participation, an outline of topics was prepared, and is appended to this report. The outline was intended as a comprehensive overview, and although all major topics contained were discussed in considerable depth and detail, some sub-topics received less attention. Work-sharing approaches attracted the most interest as the strategy offering the greatest potential for minimizing unemployment in the current recession. Broader legal and macroeconomic implications of the proposed alternatives and their relationship to national economic policies also were assessed. Much in the transcript of the conferences merits further study, but in light of the large-scale continuing unemployment, the merits of the varying alternatives to layoffs, their applicability, and the techniques for implementation are the paramount considerations. This report, therefore, will concentrate on those aspects of discussion with particular emphasis on actual experience reported in varied situations to serve as models. The report has three parts: the first summarizes the conference discussions, the second presents six examples of the use of alternative approaches as models, and the third discusses the implications for public policy.

Plaintiff's Appendix N - Alternatives to Layoffs

I. THE GENERAL APPLICABILITY OF ALTERNATIVES TO LAYOFFS

Underlying the discussion of alternatives to layoffs was the expressed understanding that it is incumbent on management to explore all forms of cost-saving before or concurrent with a review of labor costs. Alternatives to layoffs are not to serve as alternatives to all forms of cost-cutting, but to be considered only when a reduction in output becomes an absolute necessity because of a shrinking market, or when lower labor costs are essential to the financial health or competitive position of the company. The proposed alternatives have sharply differing applicability and, therefore, are not proposed as palliatives for all occasions of financial distress.

Although it is admittedly difficult to generalize about the totality of national business problems, in discussion and especially after careful examination of actual experience, the participants were able to formulate some principles governing the potential applicability of alternative strategies. A first consensus was that alternatives to layoffs can be used in response to some seasonal, cyclical or structural company or industry problems. More than the nature of the economic problem, it is the dimension and probable duration of financial pressure that is most likely to dictate the choice among the various alternatives

and determine whether an alternative will obviate or only minimize the necessity for layoffs. For example, where business conditions require a drastic cut in work force size, layoffs probably cannot totally be precluded. Also, in an industry suffering long-term and apparently irreversible decline, the use of alternatives will serve only to minimize or delay the impact of layoffs. Various alternatives, alone or in combination, will be most successful when the labor cost cut demanded is short of drastic, and when the economic problem faced is likely to be resolved in the relatively near future. In relation to the choice among alternatives, if necessitated cuts in labor costs are relatively small, or of projected short duration, then attrition, voluntary furloughs, early retirement or transfers can be effective alternatives, especially in large organizations. Work-sharing approaches are useful primarily as an alternative to yet more sizable layoffs, and when the expectation is that most of the work force will again be demanded on a full-time basis in the relatively near term. Of equal significance to the nature of the financial problem may be company or industry attitudes. The employment history of a company or industry may condition management and labor attitudes toward seeking alternatives. For example, a company that has enjoyed sustained and continuous growth and financial stability, and never has been forced to consider layoffs, may tend to

systems of work-sharing, or wage rates that take into account the instability of employment. But the models reported show that when workers are presented with an alternative to layoffs as either necessary to the survival of the organization or as a measure of greater benefit to all workers, they often will respond, even when all must share in the hardships.

Company size may also be a factor. Size alone is not an index of financial stability, but larger companies often are able to achieve substantial savings without layoffs by reducing executive salaries and perquisites, eliminating employee services such as cafeterias and recreational activities, ending the use of overtime, and by more stringent application of rules governing absence and sick leave. In smaller companies such procedures are unlikely to yield any significant reduction in overall costs. Small companies, however, may have special incentives to find ways to retain their employees. Often work is highly individualized, and the loss of even a few workers may be of greater consequence to the small company's capacity to function.

The relative cost savings of the various alternatives compared with layoffs are difficult to calculate for any individual company and even more difficult to generalize. Layoffs may cause direct costs of severance payments, often a part of collective bargaining agreements or customary in non-unionized settings, and an increased rate of contribution to unemployment insurance. The latter would have more significance to historically stable employers where the

unemployment insurance rate of contribution is low. The costs to company morale and to efficiency resulting from the loss of experienced and skilled workers elude dollar calculation. The values attached to [illegible] relative intangibles obviously depend on management and personnel department judgements as well as the amount i[illegible] in recruiting and training.

More important than comparative cost savings between layoffs and any alternative, again, may be managerial and worker attitudes. The desire to seek creative solutions to economic problems and the degree of sensitivity to the social implications of [illegible] have a [illegible] influence on decisions to develop [illegible] alternative plans [illegible] the savings to be derived. When layoffs are viewed as a last resort, cost calculations will include organizational morale, community effect, and the avoidance of the trauma of unemployment even for a relatively few. This was not only explicit in the conference discussions but concretely evidenced in the actions [illegible] by many conferees.

Relative Merits of Various Alternatives

No single alternative is applicable to every situation, but some have more limited utility than others. The primary difference is that some of [illegible] options discussed reduce the total labor cost without [illegible] the number employed or the hours worked, while other [illegible] ce numbers or hours. By and large, this recession has caused a contraction of the markets for most private sector businesses, and therefore, attention

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centered on those strategies that reduce the labor force without layoffs. But the public sector and some segments of private industry are not experiencing any decline in demand; nevertheless rising costs impel consideration of options to cut labor costs without affecting numbers and hours.

The obvious and perhaps least acceptable way to reduce labor costs, without affecting work force size, is to lower wages. Some companies have drastically reduced executive and middle-management salaries and expense budgets. The savings realized sometimes are essentially symbolic, intended to induce other employees to accept the need for retrenchment. One participating company reported a voluntary pay cut taken by a highly paid group of employees, but the prevailing view was that across-the-board wage cuts were unlikely to be accepted as an alternative to dismissing some employees, especially in unionized settings. Continuing inflation militates against its acceptance, and unions would tend to resist any alteration in the wage rate. Using top management salary reductions as an inducement for lower echelon pay cuts probably will not succeed, because the residual executive salary would still appear to be comparatively generous compensation.

In some instances employees have been willing to defer or forego scheduled cost-of-living or merit raises, but not in every case reported at the conferences. Much depends on

the prevailing salary level, as well as other factors. Union leaders agreed, however, that workers generally will be more amenable to changes in future earning rates than to cuts in current wages.

Reduction of Benefits

In many large companies the benefit package is a sizable part of total labor costs and one where potentially large savings, in theory, could be realized. This strategy, however, is mainly applicable to public employment, or to those parts of the private sector where demand for the product or service is unaffected (voluntary hospitals, for example). A further limitation is that in large diversified organizations, benefit cuts must be applied across-the-board and generally cannot be applied with the flexibility of other alternatives in response to localized or departmental overages of personnel. The fundamental problem, however, is that most benefit programs are a part of union agreements achieved only after considerable effort and construed as intrinsic to the wage package.

It is generally assumed that union leaders would resist any reduction in benefits, viewing it as a significant regression in the wage pattern, and that workers also would consider benefits non-negotiable. But it cannot be assumed that all workers will react in a monolithic manner. Union leaders among the conference participants were critical

of the tendency among their counterparts to speak for membership without accurate knowledge of grassroots reaction. Recent experience of some municipal unions is indicative. When the alternatives are put to the membership their reactions may differ from those of their elected representatives. A breakdown showing the cost of benefits can be the beginning for a realistic reassessment of options.

Savings can also be realized through reduction of sick leave and paid vacations. And without actual reductions, more effective enforcement of conditions of employment including punctuality can, in large companies, contribute substantial savings. The representative of a national company reported that some potential layoffs were averted merely by eliminating costly deviations from standard work rules, achieved largely by the response of employees when they understood the nature of the company's financial problems.

The conference participants were not overly sanguine about the prospects for actualizing much of the potential savings to be achieved through reduced benefits, until national health insurance or other public provisions supplant employment-based insurance protection now so widespread. And because most participants were concerned with cutting output, other alternatives were analyzed in greater detail.

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Voluntary Furloughs

Voluntary furloughs, or unpaid vacations, can be effective to alleviate short-term over-staffing. Several of the participants reported using a program of voluntary furloughs alone or in combination with other strategies to relieve temporary excesses of personnel occurring in the past and during the current recession as well. Unpaid vacations or leaves of absence of varying duration are offered to personnel, and generally all terms of employment, benefits, wages and seniority are preserved. Voluntary furloughs clearly are a limited strategy for reducing payroll costs of value only in large companies as a source of significant cost reduction. Voluntary furloughs moreover appeal chiefly to categories of workers such as the younger and not yet career-oriented employee, the older worker whose family responsibilities have diminished, and the working mother of young children. Among conference participants Avon and Pan American representatives reported successful use of voluntary furloughs. Avon has found many volunteers for extra unpaid leaves among women employed as clerical workers, and Pan American among flight crews who tend to be young and education-minded.

The major limitation to this alternative is that the ability to recruit volunteers for unpaid leaves tends to diminish when unemployment and the cost of living increase. As the current recession deepened fewer workers volunteered,

it was reported. Therefore, voluntary furloughs probably are useful mainly when the labor supply is relatively tight, or in the early stages of a recession, and particularly as a response to seasonal drops in business activity of short duration. It may be possible to stimulate use of unpaid leaves by offering extra educational or travel allowances, but this would obviously reduce the labor cost savings.

Early Retirement

Early retirement programs as an approach to cutting the labor force has become similarly limited during this deep recession. In the past, the opportunity for early retirement has been a coveted provision in union agreements, but inflation has lessened its current appeal to workers. The U.A.W. finds that retirees who opted to retire earlier on what seemed to be an adequate income level have seen inflation erode their living standard, and have discouraged their successors from taking advantage of early retirement plans. The Federal Government's early retirement plan has been more successful than most because of a cost-of-living escalation clause. High bonuses or increased severance pay to those who retire before the mandatory age may also add attraction to early retirement plans, but these costly extras are likely to appeal only to those nearing retirement age, or workers employed in an occupation such as type-setting, now being phased out of existence.

On balance, early retirement plans may assist a company faced with a gradual or long-range job shrinkage, but not of major value in a recession. Unions moreover are less likely to seek early retirement plans now than in the past, because they have found the result of retirement to be a loss in the total number of jobs when retirees are not replaced.

Attrition and Transfer

When the labor problem a company faces is gradual or a matter of internal structural changes, then attrition or transfers coupled with training can be a useful policy. J. C. Penney, for example, reduced 400 potential layoffs to 140 through inter-departmental transfers facilitated when the problem was put directly to the workers. And the New York Telephone Company until very recently has been able to use transfers coupled with training in lieu of layoffs because of its ability to anticipate growing areas of skill need. But when a deep recession necessitates more radical reductions, then, as the New York Telephone Company experience demonstrates, the rate of attrition declines and transfer opportunities shrink. Then work-sharing may be the only remaining alternative to avert or minimize layoffs.

Work-sharing Approaches

Work-sharing emerged in the conference discussions as the alternative to layoffs with the widest potential appli-

cability to recession-based economic problems, and to almost all types of business and industry. Work-sharing may take the form of a shorter work week, or rotating and staggered shifts, or any other method by which average hours worked are reduced. Work-sharing, however, is not a panacea. Its use is limited by the necessity of providing a living wage. In instances where the necessary reduction in total hours worked would be more than 20%, the use of work-sharing for anything more than a brief period might cause too much hardship, and handicap all those affected unless such employees receive well-above-average rates of compensation. The 20% limit, of course, is only a rough guide based on average earnings. The amount of sharing that can be supported will depend on the particular wage level, with recognition given to the difference in take-home pay, rather than gross earnings. Nevertheless, at all wage levels, work-sharing probably will not suffice when a radical reduction in output becomes necessary. The automobile industry, for example, is a case in point. When it is necessary to eliminate an entire shift or halve production, work-sharing would not be a feasible alternative. Conversely, when only minor layoffs are contemplated - for example, a reduction of some 20 employees out of a total work force of 1,000 - worksharing probably is not indicated, nor is it likely to be accepted by the employees. These limitations assume that unemployment insurance or

other forms of protection are not available to compensate workers for some part of wages lost through reduced hours.*

Within these general limits, some form of work-sharing can serve as an alternative to layoffs, not only when a reduction of output is dictated by a shrinkage in demand or by the existence of excessive inventories - although these would be the primary indications for use - but also in some instances where the high cost of operation rather than declining demand is the immediate financial problem.** Some form of work-sharing can be instituted, it was agreed, for piece workers, hourly workers, salaried employees, and in manufacturing, service industries, and non-profit settings, including universities and public employment. The form adopted may vary with the nature of the business. In manufacturing, a total plant shut-down for one day per week or alternate weeks may be more efficient and less costly than maintaining a five-day production schedule with fewer workers throughout. The four-day work-week may be preferable in service industries where continuous operation is essential. The potential usefulness of work-sharing is relatively wide because unlike reductions in benefits or wage cuts, work-sharing need not be applied across-the-board to all employees of a large organization,

*Proposed changes in unemployment insurance are discussed later in this report.

**See, for example, the Washington Star model.

but can be confined to specific areas, functions, or departments, as dictated by business needs.

The most difficult industries for work-sharing suggested by the conference participants were health services and the construction industry. In hospitals, those departments not engaged in direct patient services could operate on shorter hours easiest. In the construction industry, because workers generally are hired for short time periods, contractors might have difficulty in adopting a systematic work-sharing scheme. Several unions in the construction trades, however, practice a form of work-sharing, spreading the available work among the membership. Company size also does not appear to be a significant factor in the applicability of a work-sharing alternative, with the possible exception of extremely small organizations of perhaps less than ten employees. Small organizations, however, often have the close contact that generates a greater interest on the part of all workers in the company's success.

In theory, the conference participants agreed work-sharing has enormous potential, but where agreement is required, the receptivity of workers to sharing the burden of a necessary reduction in the workforce is critical. Worker receptivity to work-sharing plans is contingent on several factors, but, according to the experiences related at the conferences, acceptance is not necessarily dependent on whether an individual worker is vulnerable to layoff

because of low seniority status. Among Washington Star personnel, the initiative for work-sharing came from union officers and senior employees who themselves were not liable to termination, and conversely, among those who voted against work-sharing were some who would have been dismissed had layoffs taken place in accordance with seniority rules. Union leaders believe that the higher-paid and senior workers may grumble after the fact, perhaps because a percentage across-the-board wage cut represents to them a larger dollar loss, but they also may tend to be more supportive of the sharing approach because they have a greater sense of identification with both the job and the employing company.

The severity of an employer's economic problem, especially when the company's survival seems threatened, appears to increase worker receptivity because crisis often breeds solidarity. The models presented in this report, however, include a company faced with a critical problem, but also one with only a short-term inventory problem, and another that is a part of the Bell System, one of the most stable companies in the country.

Whether or not worker attitudes toward work-sharing depend on the type of employment is unclear. Some participants believe that receptivity depends on the degree of worker attachment to an occupation or to an employer, presumably greater in skilled jobs. Pan American's experience, however, has found no significant difference in response

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among such disparate groups as computer programmers and jet engine repair workers.

The most significant factors appear to be good employer-employee relationships that result in a genuine community of interest; an identification with the company as a good place to work; and an open communication system that allows for two-way discussion of business problems and possible alternatives. When workers have sufficient access to financial data to be convinced of the need for labor-cost savings or cuts in output, and a sense of involvement in the decision-making process, then the acceptance of work-sharing probably will be limited only by such questions as whether a reduced work schedule will afford a livable wage rate, and perhaps by the availability of similar jobs elsewhere. The quality of management-worker relationships and joint involvement in fundamental problem-solving are more important determinants of the feasibility of work-sharing than whether or not a company is unionized. This much is clearly evident in the models reported.

The savings accruing from work-sharing may be less than those resulting from an equivalent reduction of personnel through layoffs. The cost of benefits and of personnel administration continue for the total personnel. The cost per worker of administration and supervision may actually increase. Rescheduling may add additional burdens. These extra costs may be only partially offset by the avoidance

of severance pay and a higher rate of contribution to unemployment insurance, but other compensatory factors exist - increased employee morale and productivity, the retention of trained staff and the enhancement of the company image. With respect to productivity, experience with the four-day week in the textile and automobile industries has shown actual increases in the rate of output and decreases in absenteeism, at least in the short-run. Work-sharing plans can stimulate more efficient organization. Employee goodwill and solidarity plus the preservation of the full range of worker skills may be especially significant to the company's ability to weather a turbulent economic period.

How to determine when a work-sharing program should be terminated was not fully resolved. Restoration of the former work schedule and full pay obviously depend on the resolution of the financial problem that caused the adoption of work-sharing and in unionized companies might well be subject to contract negotiation. When work-sharing is adopted in response to finite problems such as excessive inventories or materials shortages, the time for restoration of the full week can readily be determined. The time for ending work-sharing will be more difficult to specify when the reason for the cutback was an unprofitable operation or inadequate profit margin.

Some participants were concerned by the possibility that work-sharing might result in a demand for permanently

shorter hours at full pay. A policy instituted only as a temporary response to a recession could possibly influence the norm for full-time employment. Whether or not this would be beneficial depends on one's frame of reference. Economists participating in the conferences who customarily focus on macroeconomic considerations saw this possibility as a positive aspect in a society in which the labor force has been increasing faster than the number of jobs. Shorter work-weeks may be the future pattern in peak production periods. An American Management study conducted in 1972 found 140 companies functioning on less than a five-day week. Management representatives on the other hand were justifiably concerned with the problem of increasing productivity sufficiently to allow them to compete in the world markets while operating on a permanently shortened week.

In the current recession, however, work-sharing as an alternative to cuts in the work force through layoffs has clear social values. It can diminish the number of job-holders whose work-lives are disrupted and who become dependent on public support, decrease anti-social behavior that always rises with unemployment, and importantly, it will preserve the gains made through affirmative action. Sharing the effects of this recession may adversely affect the earnings of more workers, but providing continuity of work experience for the greater number, especially for those

who would bear the brunt of layoffs, can more than offset any temporary hardship. Work-sharing can heighten the attachment to a job, to the union, or to an employer among those segments of the labor market that characteristically are less stable than others—the younger workers, members of minority groups and women. Frequent and involuntary periods of unemployment, coupled with the necessity for job-changing, is damaging to career orientation and to job satisfaction. Work-sharing, if it reduces the impact of unemployment on these groups, could have longer range benefits to the work ethic, productivity, and the competitive position of the American economy.

Union Responses

One focus of the conference discussions was the probability of union resistance to adopting alternatives to layoffs. Representatives of unionized companies tend to view management's ability to alter employment practice as circumscribed by the terms of union agreements. Labor leaders are unsure of membership response to any proposal that would reduce workers' living standards, and are fearful of the impact of a negative response on their re-election. For both, layoffs carried out in accordance with well-defined prior agreements present fewer difficulties than may arise from reopening negotiation of controversial alternatives.

As is often the case, union resistance is more apparent when the topic is generalized, rather than in particular

instances. Actual experience discussed at the conferences shows how often anticipated resistance dissolves against a specific problem. But even in the general discussion at the conferences it became clear that union agreements do not pose insurmountable obstacles, and that the union structure can be an asset in formulating and implementing new policies.

The assumption of union resistance is understandable but may not be warranted. First, only approximately one-fourth of the labor force is unionized. Second, union agreements are not identical, nor are they as prohibitive of work-sharing, for example, as is often assumed. The latter misconception arises largely because the alternatives often are perceived to be in opposition to seniority rules when in fact work-sharing, benefit reduction, or other options do not call for the waiver of normal prerogatives or protections of seniority. Third, union representation provides a democratic mechanism for problem-solving, not as readily available in unorganized companies.

Union contract provisions relevant to layoffs tend to reflect the history of the business or industry. Some spell out layoff proced res in considerable detail. In the automobile and textile industries, where model changes, seasonal factors or wide cyclical swings in demand for products are characteristic, union agreements may specify the responses to downturns in business activity, prescribing precise methods for reducing hours or shifts. But such

specificity is relatively rare. Management generally is free to determine the size of the work force and the hours of work. Contract provisions relevant to the application of work-sharing fall into three general groups. Most union agreements define a standard work-week only as the minimum number of hours beyond which overtime rules apply, and thus a shorter work-week could be instituted by management without union consent. Some others stipulate a guaranteed work-week as the minimum. A third type, generally found in volatile industries, allows shorter hours for specific categories of workers, usually restricted to short periods of time. Many contracts also provide for joint management-union consultation prior to layoffs to discuss possible ways to alleviate hardship, and some require consultation before changes in the work-week or sizable layoffs can be effected.

The inference from the discussion between management and labor representatives is that the feasibility of new strategies to resolve economic problems is determined less by contract provisions than by the flexibility of both management and labor representatives to respond to situations as they arise. The ability to innovate successfully depends in part on the character of union-management relationships. In the automobile industry, for example, worker input into managerial decisions was described as limited, at best. As a result, in one company, when management proposed rotating layoffs, union opposition forced a plant shut-down. This response contrasts with textile and clothing industry

experience, where workers and their unions have been responsible in large measure for the industry's survival in the face of foreign and other competition. Where collective bargaining has assumed a particularly adversarial atmosphere, management will be reluctant to re-open negotiation. And where union officials feel any insecurity in their roles, following the letter of the contract may appear to be the indicated solution. Employees who are dismissed may be hurt, but once off the payroll constitute no further problem to management or union officers. Those whose jobs are preserved are content, and except in a few industries such as construction, those discharged cannot voice their dissatisfaction because they no longer vote in union elections.

Apart from the general climate of labor relations, much also depends on the leadership quality of company executives and union officers, and the extent of their contact with all categories of employees. In the opinion of business participants, any significant change in employment policies is best handled as a joint management-employee problem. Both management and union leaders often fail to extend their contacts below the level of first-line supervision. They thus may misjudge worker attitudes and underestimate the flexibility of worker response. The conference discussions on worker preferences among the possible alternatives to layoffs discloses the gaps in the knowledge of worker

reactions. Unionized companies have the advantage of a well-developed mechanism for creating two-way discussion and heightening worker involvement in business problems. The existence of representative management-labor committees and a system for elections allows for an orderly two-way consultation and an accurate appraisal of grass-roots opinion. Both, it was said, are often underutilized. Indeed, a major recommendation made at the conferences was the addition to future union contracts of a clause requiring discussion of alternatives before the institution of layoffs, and the opportunity for all employees to signify their preferences by vote.

Non-Union Companies

In theory, non-unionized companies have unlimited authority to determine their employment policies. But the capability for unilateral action is not as absolute as it may appear, for the impact of authoritarian decisions can be disastrous to morale and to productivity unless the decisions are understood as justified by economic necessity and equitably applied. The fundamental tenets of job security established through collective bargaining have, moreover, become the standards for much of personnel practice. Indeed, among large and prestigious employers the absence of unionization often is attributable to satisfactory working conditions and good labor relations.

Plaintiff's Appendix N - Alternatives to Layoffs

In layoffs, the seniority rule generally governs, because with the exception of critical skill needs, seniority both meets the employer's preference for retaining the more experienced workers, and is least likely to cause discontent. Sophisticated employers regard seniority as the only valid basis for layoffs dictated by economic conditions and good personnel practice. Recession calls for the elimination of less productive workers through normal termination procedures rather than as layoffs. Representatives of non-union companies believe that their ability to implement alternatives to layoffs does not differ substantially from that of unionized companies; and those companies where only part of the work force is organized treat all categories of workers alike. Freedom from explicit contractual obligations does not imply that employee understanding or consent is not essential to the successful institution of any major change in benefits, hours of work, or any other basic condition of employment.

Effective channels of communication between management and personnel are valuable also because the capacity to solve all company problems is not lodged exclusively in managerial ranks. Several participants reported that eminently practical suggestions for meeting the current recessionary problems came from lower-echelon employees. In large national companies, top management often is distant in location or in function from the essential operations, and

therefore would be unwise to dictate all policy. Many have developed systems of representation and referenda that are analogous to typical union structures.

In the current recession, the non-unionized sector has assumed particular importance because white-collar workers, who are often unorganized, are experiencing an unprecedented rate of unemployment. White-collar jobs have acquired special desirability because of their historic security. Now that this traditional security is threatened, they may be the category of work that should be a focus of experimentation with alternatives to layoffs.

THE MODELS

Plaintiff s Appendix N - Alternatives to Layoffs

The strategies for implementing alternatives are best seen in actual experience. Six models are described and all except the New York Telephone Company* experience were discussed at the conferences. Work-sharing in some form was adopted in each instance.

Most of the models are too recent to permit evaluation of their impact on business operations. Nevertheless, it is possible already to confirm the Commission's view that work-sharing is feasible in many situations and can substitute for or reduce the impact of layoffs. Particularly striking in these models is the leadership role played by some unions, using the required pre-layoff consultation as the impetus for exploring new solutions to critical business problems. A second finding is that disclosure of sufficient financial data by management is important. Unions leaders must first be convinced that layoffs are necessary before they will undertake the task of persuading members to adopt alternatives.

The importance of good employee relations also is illustrated. Pan American, for example, has gone beyond union contract requirements to develop worker involvement in difficult decisions and benefitted as a result by voluntary pay cuts and a sense of company solidarity. Hewlett-Packard,

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*Although the New York Telephone Company participated in the conference, the company decision to lay off workers was made after the Commission's conferences. Personnel officers and union officials shared their experience with Commission staff.

a non-unionized company, is able to adjust work schedules when necessary because its employment policies and profit-sharing plan have given employees a genuine interest in the company's future.

It should be noted that only in a few instances was the disparate effect of layoffs on minority or female workers a factor in the decision to use layoff alternatives. When preservation of gains made through affirmative action was a factor, as for example in the case of the Washington Star, it was not the primary consideration, nor was it used as a selling point. The desire to avoid layoffs and the attendant hardships was the prime motivation, stemming from the broad social objective of securing the best for all employees.

The Washington Star

The Business Problem

For several years, the Washington Star has been operating at a loss. The company's problems antedate the 1974-75 recession, but the recession has intensified its financial difficulties. New ownership acquired the Star in the fall of 1974 with the intention of improving its economic position. A critical need was to cut all costs including labor costs without affecting the company's ability to publish a newspaper daily and Sundays. Employees were well aware of the need for cost reduction because the operating losses were a matter of public knowledge. In November 1974, rumors of imminent and sizable layoffs were rampant.

Plaintiff s Appendix N - Alternatives to Layoffs

Relevant Union Agreement Provisions

The Star is fully unionized with 13 separate unions representing different categories of employees. The Newspaper Guild, representing 550 of the total 1,750 full-time employees, ranging from editorial personnel and reporters to dispatchers, is the union with the largest membership.

The Guild's agreement with the company did not preclude a unilateral management decision to determine the size of the work force, but governed the hours worked. In addition to requiring that layoffs be made on the basis of seniority, the agreement stipulated a five-day 37 1/2 hour work-week. Thus, it would have been impossible for the company to institute work-sharing without union consent. The agreement also provided for, but did not require, union-management consultation to determine how to alleviate the hardship of layoffs.

Developing a Work-Sharing Alternative

1. Determining the necessity for layoffs

In the face of rumored layoffs, Guild officers requested a meeting with the management to ascertain first whether layoffs actually were planned. Management acknowledged the planned dismissal of approximately 100 in Guild jurisdiction, with lists already drawn for 60 immediate dismissals and an additional 40 at a subsequent date. Second, union officers requested the right to inspect the company's earning statements and projected budgets to verify the magnitude of losses sustained and the necessity for labor cost reduction. This was granted, and company financial data together with pertinent information

contained in an independent audit, confirmed the critical financial position and the absolute need to reduce labor costs.

2. The rationale for work-sharing as an alternative

To preserve the quality of the publication the company requested a waiver of seniority rules, permitting the layoff of less productive and less essential workers. The waiver was denied by union officials. Convinced that labor cost reduction was essential, but fearing that layoffs of the magnitude contemplated would damage the quality of the publication and thus hasten its demise, the union sought a constructive alternative. Union leaders also were aware that layoffs in accordance with seniority would eliminate many talented staff members and especially the minority members and women only recently hired. The fundamental purpose for constructing an alternative plan, however, was to cut in a manner that would enable the Washington Star to maintain its competitive position and insure the ultimate security of all jobs.

Prior to 1974 contract negotiations, the responses to a questionnaire circulated among Guild membership to determine attitudes toward a variety of improvements in the terms of employment indicated that many workers approved of a four-day week. This response fortified union officers' belief that a shorter work-week was the answer. What followed was the development of a comprehensive and thoughtful work-sharing solution.

3. Securing management and worker approval

The union proposed a four-day week as an alternative to

layoffs. This reduction in hours would be roughly equal to the dismissal of 20% of Guild members. Rescheduling, it was believed, would permit the continuance of a seven-day week operation. Union leaders argued that an across-the-board cut in hours of work would preserve the diverse and specialized skills of the total staff, and therefore be preferable to layoffs. Although the labor-cost savings of reduced hours might be somewhat less than layoffs, because the high cost of benefits would continue to be incurred for the total membership, the advantages of greater efficiency and superior quality of the product would more than offset any cost-saving differential. It was also argued that layoffs would increase the Star's unemployment compensation payments. Management, although hesitant at first, soon approved the adoption of a four-day work week. The remaining task for union officers was to secure membership approval.

To gain employee support, a day-long open debate was held, followed by a secret vote by all Guild members. The primary argument presented by union officers was that a four-day week was more likely than layoffs to maintain the quality of the publication and the company's competitive position, and that it was in the union tradition to pull together and consider the needs of fellow union members. In addition, it was felt that seniority by layoffs might mean losing valuable and talented workers. The four-day week was approved by a sizable majority.

Implementing Work-Sharing

A supplementary agreement was signed December 22, 1974, changing the work-week to four days or 30 hours, effective until contract expiration on December 8, 1975 unless the

business situation improved and permitted earlier restoration of a five-day week. A formula was developed through which the across-the-board 20% cut would give the company 7,800 man-days of work in excess of what would have resulted from laying off 100 employees. These excess hours were placed in a "man-day pool", to be drawn upon for fifth-day work assignments that would be granted on the basis of two criteria: personal hardship and operational need. The Guild monitors the awarding of fifth-days, to be rotated as much as possible among all employees. Under the terms of this agreement, all fifth-day assignments given individual employees are treated as straight time. Benefits and scheduled cost-of-living increases were not affected.

Additional terms of the supplementary agreement eliminated part-time and temporary employment, liberalized early retirement compensation, made additional work available for regular staff by assigning to them work formerly contracted to outsiders, and relaxed the rules governing the acceptance of outside free-lance work by Star employees.

A Progress Committee composed of management and union representatives was formed to monitor the progress of the four-day week operation, including assignment of fifth-day duties, any new hires in vital areas occuring because of attrition, and all other aspects of the agreement.

The possibility of terminating work-sharing is reviewed at periodic joint meetings. The supplementary agreement permits the union to initiate action for the restoration of a five-day week when warrented by its assessment of the company's financial status. Extension of a four-day week beyond the contract expiration date will be subject to new contract negotiation on December 8, 1975.

Effect on Operation

The newspaper is operating its usual seven-day week and layoffs of Guild members were totally averted. Changes have been

made in operating structure and in the publication format. The general feeling among staff and the community is that the Star is regaining prestige.

Following Guild action, unions that represent other Star employees have negotiated alternatives to avoid or reduce layoffs, by eliminating overtime or costly staffing rules or, in the case of the Teamsters Union local, by consolidating delivery routes.

Morale is reported to be good, and Guild membership satisfaction is evident in the re-election of the officers who proposed work-sharing. Also, absenteeism has declined and productivity has increased.

Facilitating Factors

The critical financial condition of the company, confirmed by union access to pertinent financial data, and the attachment of workers to journalism and to the company, contributed to the successful adoption of work-sharing. The satisfactory wage structure and the relatively near-term expiration date of the union agreement in force, were additional facilitating factors.

Hewlett-Packard

The Business Problem

This major manufacturer has enjoyed continuous growth since the 1930's and never has resorted to layoffs. In the recession of 1970, and again in the fall of 1974, the company was faced with excessive inventories, a problem common to the electronics industry. It became necessary to reduce

production commensurate with actual orders until excessive inventories were eliminated. To do so required an approximate 10% decrease in output.

Management-Labor Relations

The company is not unionized. The climate of management-labor relations has been favorable because of a strong commitment to stability of employment, maintained by refusing short-term contracts that would result in wide variations in production. In addition, a generous profit-sharing plan gives employees a significant stake in company prosperity.

The Work-Sharing Plan

In the summer of 1970, to achieve the indicated reduction in output, the company President determined to share the existing work rather than to discharge any employees. After careful consideration of all possibilities it was determined that employees in the manufacturing division would work four days on alternative weeks, scheduled so as to give all staff two three-day weekends each month. Accordingly, during the three summer months all salaries were reduced by 10%. Again, at Christmas of 1970, and in the fall of 1974, relatively small inventory build-ups occurred, and to reduce output manufacturing operations were shut down for a few days, scheduled so as to extend the holidays.

No changes were made in benefits or merit increases, or in the profit-sharing arrangement.

Effect on Operation

Through modest work-sharing arrangements, layoffs were avoided. The costs of full benefits and of the extra administrative and supervisory time required to reschedule staff, it is believed, were offset by gains in efficency and morale. The company attributes its sensitivity to job security to a strong public image and a high level of worker job-satisfaction, a quality that distinguishes it from some manufacturers of electronic equipment that frequently make sizable layoffs.

Pan American Airways

The Business Problem

The combination of a four-fold rise in fuel prices that caused increased airline fare rates, and a world-wide recession, have resulted in a drastic decline in aviation traffic. The volume of traffic may improve with an upturn in the international economy, but any anticipated improvement will be restricted by the fuel problem, one unlikely to be overcome in the near term. All executive salaries have been frozen, travel allowances cut, and services such as cafeterias and the company newspaper have been eliminated; but the decline in aviation traffic has made it impossible to entirely avoid layoffs: Pan American's total employment has decreased from 42,500 in 1968 to below 30,000 in 1975, but this reduction has not been through layoffs alone. The company has been exploring all possibilities for minimizing layoffs throughout its divisions. Some alternatives already have been adopted

to share the available work among flight personnel, and the company is exploring possible alternatives for other groups of employees.

Relevant Union Agreement Provisions

Pan American is highly organized with approximately 70 separate unions representing segments of the work force. All union agreements require layoffs in accordance with seniority. Flight crew personnel are representated by the Airline Pilots Association, the Flight Engineers International Association and the Transport Workers Union (the latter represents cabin attendants). Union agreements provide for a guaranteed minimum monthly pay, but beyond this minimum the company can set the average of monthly hours to be worked.* Although not required in some union agreements, it is company policy to consult with union representatives before making any significant change in the average number of hours of work for flight personnel, or before instituting any major change in the number employed, or the terms of employment.

Implementing Work-Sharing for Flight Personnel

Joint discussion was undertaken with officials of the three unions representing flight crew personnel. All company financial records were opened to union officials for inspection. (The financial data of aviation companies is a matter of public record.)

*For Pilots, there is also a maximum number of flying hours.

Plaintiff's Appendix N - Alternatives to Layoffs

The Airline Pilots Association adopted an 11% reduction in salary schedules to run until the end of 1975, and, in addition, reduced the maximum hours allowable for pilots from 85 per month to 75, to share the available flying time.

Flight engineers and cabin attendants have agreed to a pay reduction similar to the pilot's group. A majority vote on the pilots' and flight engineers' union signified approval of the modification of the union contract necessary for pay reduction; the cabin attendants' union is currently negotiating this change.

The Effect of Work-Sharing

Work-sharing for flight personnel has minimized the number of layoffs. To further reduce excess capacity the company has offered inducements for early retirement and voluntary furloughs. In addition, to avoid layoffs a liberalized leave of absence program for cabin attendants has been instituted through contract language modification agreed to by management and the union.

Because of the complexity of an around-the-clock international operation, no single plan for all categories of the work force can be applied. Currently the company is experimenting with a variety of work-sharing approaches for office workers and maintenance workers and other non-flight personnel to determine the most effective strategies. Management is engaged in discussing a variety of alternatives prior to the forthcoming negotiations with several unions. Staggered shifts, for example, may better suit some aspects of company operation than shorter work-weeks.

Facilitating Factors

The ability to implement work-sharing in a variety of forms was facilitated by the well-known severity

of the company's current problems. Personnel understand that unless new approaches are tested, the jobs of skilled personnel with 20 or more years of service may be threatened. Management's desire to retain skilled personnel is matched by the employees' attachments to the occupation and to the company, an attachment intensified perhaps by the lack of similiar jobs elsewhere.

The company policy of involving union representatives in problem-solving and in ascertaining worker preferences through voting has enabled it to institute radical changes without destroying worker morale.

Western Electric Installation, A Division of
the Western Electric Company

The Business Problem

Western Electric Installation installs telephone equipment in central offices in the five boroughs, and in Westchester, Rockland and Nassau Counties. All work is under contract to the New York Telephone Company. Technological advances, a decline in the rate of growth in the long-term demand for telephone equipment, and the impact of the current recession have reduced the volume of new installations. Through local union initiativi, supported by the International Union of Communication Workers of America, alternatives to layoffs have been used to deal with relatively small reductions in the total volume of work, actions that may be the forerunners of larger scale work-sharing in the future.

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Plaintiff's Appendix N - Alternatives to Layoffs

Relevant Union Agreement Provisions

In addition to providing for layoffs on the basis of seniority, the union agreement requires joint management-union consultation to negotiate methods of circumventing layoffs and to diminish the hardship of any necessary layoffs. Local 1190 of the CWA represents the workers at Western Electric Installation.

Implementing Alternatives to Layoffs

Because all work is contracted well in advance, the future work-load can be projected accurately. Local 1190's leadership has handled potential layoffs in two ways. When a strike in the manufacturing division of Western Electric reduced the supply of equipment, all staff worked a four-day week for a period of approximately six weeks. Second, to spread the available work more equitably, in May 1974 a new method was formulated for the treatment of overtime. Prior to this agreement, all Saturday work was compensated at time-and-a-half and Sundays at double-time. Saturday and Sunday work formerly was assigned in accordance with the requirements of the location at which installers were employed. The new agreement provides for 40 hours of work at the rate of 44 hours of pay for all workers irrespective of the days of the week worked. The total staff is divided into three rotating shifts, each with different schedules so that weekend work is staggered and equally shared. Formerly, some workers had worked 48 to 56 hours a week. The new agreement benefits the company by reducing the cost of weekend work, but it also benefits

the workers because sharing available work including weekends has increased the average rate of compensation for all workers. Most importantly as a result, this division of Western Electric has had no layoffs,* in contrast with other divisions in other localities. The new agreement is experimental and can be terminated on one week's notice by either party, management or the union.

In addition to local union action, the International Union in February, 1975 proposed a five-point program to A.T. & T. calling for dismissal of all part-time and temporary employees; elimination of all overtime except in emergencies; termination of contracting-out of work; provision of voluntary unpaid leaves of up to six months without loss of benefits or seniority; reassignment of vacation schedules to correspond with slack work periods. To date, A.T. & T. has not responded to this proposal.

Effect on Operations

Rescheduling the work is not expected to have any effect on operations. The strategy adopted may pave the way for more comprehensive work-sharing should the work-load decline further.

The Dressmaking Industry In New York City

The Business Problem

During the 1940's and 50's, the dressmaking industry in New York City experienced phenomenal growth. However, over

*In July 1975, this division had to layoff 291 employees.

the past 15 years, the industry has witnessed a steady decline, attributable primarily to competition from imports and, more recently, the domestic economic condition.

It has been estimated that membership in the three employers' associations (Affiliated Dress Manufacturers, Inc., National Dress Manufacturers Association and Popular Priced Dress Manufacturers Group) has decreased from 600 to 300 members over the past ten years. Even in more settled times it has not been unusual for as many as 30% of dress manufacturers to file for reorganization or go out of business. Today, the turnover is now much greater.

Unemployment among industry workers now hovers around 30%. Today, for the fortunate employees who find work in this industry, 26-30 weeks work annually is more common than the 40 weeks worked in former years.

Relevant Provisions in the Union Agreement and the Operation of Work-Sharing

The dressmaking industry is highly unionized. Approximately 85-90% of all workers are members of the International Ladies Garment Workers Union. Piece-work as opposed to time-work is the predominant pattern and the basis for compensation of more than 75% of all employees. There are no seniority provisions for most workers, with the exception of the recently organized shipping clerks who demanded a seniority system in their agreement with the employer.

While a 35-hour work week is stipulated in the contract, both labor and management have displayed great flexibility concerning the number of hours to be worked. In order to avoid

increased unemployment, a 30-hour work-week has become common.

Because of the seasonal nature of the industry, a unique feature of the union agreement prevailing throughout more than 50 years of union history, provides for a division of work in times of economic stress. When insufficient work exists to allow full employment, work is divided equally among all employees. Instead of laying off workers, all employees share the existing work. This may mean working alternating days, weeks or even months.

During the periods when employees are not scheduled to work, they may collect unemployment insurance until again called upon to "share the work." While this system of division of work may reduce a worker's vacation pay (vacation pay is computed as a percent of the wages earned), other union benefits remain unaffected.

When work-sharing devices no longer suffice, in order to avoid closing down, a company, with the consent of the union (the Dressmakers' Joint Council) or the approval of the industry's impartial chairman, has the right to reorganize the business "in good faith," reducing the total number of jobs. According to the collective bargaining agreement, a bona fide reorganization can take effect when necessitated by a permanent curtailment or fundamental change in the character of an employer's business. Before a reorganization is agreed upon, the employer must demonstrate that all reasonable alternatives have been explored to avoid such an action.

When such a decision is reached and a number of workers are to be laid off, the employer does not select the workers

to be dismissed. In the absence of a seniority system, the decision is made by a lottery.

The role of the impartial chairman is unique to this industry. Appointed by both union and management, the chairman serves as an umpire whose decisions are binding upon both parties. Both parties are free to submit an issue to the chairman for resolution.

The union agreement provides for union inspection of employers' books and, therefore, union officers have an accurate picture of the employer's financial situation.

Facilitating Factors

The number of firms ceasing operation or requesting reorganization has increased over the past few years. However, the seasonal nature of the industry and its long history of dividing available work has enabled workers to adapt to the recessionary impact of increased work-sharing. This undoubtedly has helped to cushion the effects of the 1974-1975 recession on this industry.

The New York Telephone Company, Operators
Department

The Business Condition

Technological development combined with increased efficiency of operations and a marked reduction in turnover (resignations and discharges for cause have declined from an annual rate of 60% in 1970 to less than 5% in 1975) have been reducing the need for operators. Until 1975, attrition

and transfers to growth divisions have enabled the company to reduce the total number of operators employed from 12,600 in 1970 to 6,600 in mid-1975 without resorting to layoffs. The 1974-1975 recessionary impact on the volume of calls has resulted in a surplus of operators and has also restricted the opportunity for transfers to other departments. The company, moreover, may not anticipate needing in the near future all operators now employed unless the economy improves markedly. Therefore, for the first time in its history the company in April, 1975, determined to consider layoffs.

Relevant Provisions of the Union Agreement

The Operators Service Department is unionized, represented by an independent union (the Telephone Traffic Union) with six locals in the New York metropolitan area.

The union agreement requires notification of union officers 45 days prior to any proposed layoffs or part-timing. The purpose of the advance notice is to allow time to discuss methods for alleviating the hardship of layoffs. After 45 days, the company can act without union approval. All layoffs must be made in accordance with seniority.

Developing a Work-Sharing Plan

The company estimated there were 800 operators more than needed, but because a smaller layoff was feasible, the number to be discharged was reduced to 500. The Union President was so notified on April 8, 1975. Because management-union discussions are a monthly occurrence, union officers have been

aware of the possibility of layoffs.

Since the formal notification of proposed layoffs, union officers and company executives have been in almost constant consultation. Work-sharing by reducing hours for some operators was agreed upon as an alternative to layoffs. The company proposed to reduce the work-week to four days by instituting 2,500 "days off," the equivalent of 500 layoffs or 2,500 part-time employees. In the course of negotiations the number was reduced to 2,000 "days off" or 400 operators and the effective date was deferred from June 1, to July 6, 1975 to allow further time for discussion.

Union officers proposed the operators be allowed to elect to work a shorter week, believing that a sufficient number would volunteer for shorter hours. Voluntary work-sharing, the union argued, would create less hardship. This proposal thus far has not been accepted and work-sharing is to be instituted in accordance with seniority rules. Work-sharing became effective on July 6. A somewhat smaller number of operators than anticipated are working a four-day week. The precise number is determined each week in accordance with the actual volume of traffic, which in July has exceeded slightly the projected rate.

III. IMPLICATIONS FOR NATIONAL POLICY

When management and labor determine to exercise all available options, there clearly is considerable scope for the development of new approaches to manpower problems that arise in a recession. This is the basic conclusion from the Commission's conferences. The participants were well aware, however, that the alternatives to layoffs discussed are only one of the paths in the direction of an improved national manpower policy. Full employment as a national policy requires a thorough overhaul of the systems of job referral and development, career planning and training, and the legal protection of workers. Re-defining upwards the acceptable rate of unemployment is not the solution.

The participants also recognized that the use of alternatives to layoffs is not without macroeconomic effect. Restricting new hiring and terminating part-time and temporary jobs are policies with negative impact on new entrants into the labor market, as well as on many women and older job-seekers who accept part-time or temporary work because they are unable to secure full-time steady employment. Furthermore, eliminating overtime or shortening the work-week will lower the living standards for many workers whose full-time earnings may be below or only slightly above poverty levels. To what extent and for how long workers will be willing to share the burden of what they perceive to be a national problem

stemming from deliberate measures to curb inflation, moreover, is questionable.

Nevertheless, the necessity of preserving the recent breakthrough for minorities and women gives a legitimacy to the immediate focus on microeconomic considerations. Interest in the alternatives to layoffs is growing. A few national companies have prepared manuals outlining the alternatives for internal use by department heads and first-line supervisors. The Executive Council of the AFL-CIO is reported to be studying work-sharing. The possible options were discussed at two recent conferences in New York City - a meeting of the Conference Board and New York University's 28th Annual Conference on Labor. The emerging viewpoint is that although much can be accomplished through the action of individual companies and through the collective bargaining process, governmental action is required to stimulate exploration of alternatives, and to provide guidance to employers and unions on the apparent conflict between seniority rules and affirmative action goals. Only when there is a national commitment to avoiding layoffs will the use of alternatives become an accepted and widespread policy.

Centralized Information Service

Despite the newness of the concept of avoiding layoffs through alternative employment policies, there already is considerable experience around the country with some of the

alternatives, but for the most part it is unrecorded and unevaluated. The Commission in two days of small conference groups, designed to provide a broad cross-section of viewpoints rather than focus exclusively on actual experience, uncovered several examples. If the experience throughout the United States and in other developed countries were comprehensively collected and centralized into an information service under the aegis of the federal Department of Labor, management or labor representatives facing possible layoffs could readily determine whether another company, similar in size and function, had tested alternative measures. Documented experience often is the best antidote to any reluctance on the part of either management or labor to experiment with new approaches.

Technical Assistance

Second, experienced mediators and arbitrators are a source of valuable expertise. Those experts who participated in the Commission's conferences agreed that management often fails to use all of its available options, frequently underestimating the value of joint management-worker discussions, either as part of the collective bargaining process, or as panel discussions in non-union settings. Open communication can be productive not only of strategies to cope with the immediate problems of recession, but also can have a beneficial long-range impact on the quality of labor relations. Outside experts often can suggest methods for reducing all costs.

Labor costs can sometimes be minimized by modest changes in work schedules that reduce overtime and absenteeism, or by increasing productivity through training programs which are generally tax exempt. More effective use of manpower in many cases can reduce labor costs without the disruption of layoffs. The accumulated experience gained in arbitration and mediation should be codified. Pooled experience and knowledge can transform isolated activity into systematic aid for business and labor.

The expertise of management consultants seldom is available to smaller companies or to individual union locals. Free technical assistance should be made available to companies that aim to avoid layoffs and that have limited capacity for experimentation. In the absence of public provision of technical assistance, national organizations of business and industry and labor unions can begin to compile available data as a service to membership, and stimulate discussion of the alternatives. Another possible service of great potential value would be the provision of impartial chairmen, as in the garment industry, to resolve management-labor disagreements concerning alternative plans.

Benefits

The cost of maintaining benefits for the full complement of personnel can operate as a deterrent to the use of alternative strategies. The adoption of a national health insurance

program would relieve employers of expensive health benefits and thus alleviate the problem, but another possibility is to provide tax relief for employers who carry full benefits for workers who work less than full-time under a work-sharing scheme.

Unemployment Insurance

The principal weapons to deal with unemployment, unemployment insurance and public works programs, forged during the 1930's, if re-directed in appropriate instances to support continuous employment can be powerful remedies for the most disastrous consequences of recessions.

Unemployment insurance, enacted forty years ago, is long overdue for a major overhaul. As it now stands it fails to furnish uniform and adequate protection. The recent extension of compensation to 65 weeks is a stopgap measure made necessary by the national failure to devise ways to put people back to work or to advance our capacity to mitigate unemployment in other ways. Many workers now are excluded from coverage. Relatively modest reforms, however, would provide incentives to employers to avoid layoffs and increase worker receptivity to work-sharing. First, the rate of employer contribution should be adjusted to credit the use of alternatives to layoffs. Most states now tax employers on the basis of an experience rating formula that rises with the volume and frequency of layoffs. Currently, many companies are facing the possibility of layoffs for the first time in

their history. For them, the consequent rise in their rate of contribution may be a factor entering into policy determination. A contribution rate favoring work-sharing over layoffs might tip the balance. The largest number of layoffs, however, generally occur in those companies that already pay the maximum rate. Some relief from unemployment insurance contribution given to them when they adopt an alternative to layoffs could encourage voluntary action. Some conference participants who are top executives of companies that now pay the maximum rate believe that management interest in work-sharing or other alternatives would increase if a reduction of the rate of contribution were to be granted.

Economists cautioned against adjustments in contribution rates that would result in subsidizing inefficient companies, or that, in a period of recovery, would tend to restrain employers from re-hiring, especially in those categories of relatively unskilled jobs that are most vulnerable in recessions. The concensus of the conferences was that the State Industrial Commissioner should be given both the authority to adjust the rating formula to encourage the adoption of alternatives to layoffs, and sufficient latitude for discretionary action to allow individualized review in each case.

Eligibility for unemployment insurance for workers who work shorter hours would increase worker receptivity to the institution of work-sharing. Compensating those who are

partially "unemployed" is clearly less costly as well as less disruptive than layoffs. The added cost to unemployment insurance would be minimal, and whatever increase would be more than offset by savings in welfare costs, the gains in purchasing power, and tax revenues achieved through continuous employment. Not only would workers continue to receive near normal incomes, but there would also be an incentive to work (and consequently to pay taxes) rather than rely on tax-free unemployment benefits. Moreover, work-sharing can help to promote economic recovery itself. A proposal to qualify those who work less than full-time for compensation for a part of wages lost now is before Governor Carey, and many of the conference participants strongly endorsed its adoption.

The City Commission on Human Rights strongly supports widening unemployment insurance protection to cover those who work a shorter week and has been engaged actively in seeking appropriate action in New York State. The amendment sought would provide partial benefits for earnings lost through work-sharing, from as short a period of time as one-half day to a maximum of total wages and partial benefits equal to one and one-half the maximum of weekly unemployment insurance benefits alone.

On June 10, 1975, Eleanor Holmes Norton, the Commission Chair, wrote Governor Hugh Carey strongly urging his support for modification of the New York State Unemployment Insurance Law. The letter reads in part:

My interest in seeking alternatives to layoffs as a means of reducing unemployment was originally stimulated by the mandate of this Commission involving special concern for the effects of the economic crisis on the employment status of minorities and women. These groups have always suffered disproportionately when employers resorted to layoffs as a cost-cutting measure. The policy of "last hired, first fired" takes a special toll on those who have only recently gained access to employment opportunities traditionally barred to them by discrimination.

My interest in layoff alternatives, however, has expanded beyond my own jurisdictional concerns, because I believe that alternatives to layoffs, especially work-sharing, are a critical short-term remedy for unemployment in general and for all workers. Without question, the goal of equal employment opportunity is necessarily and inextricably linked to full employment. Work-sharing supplemented by unemployment insurance has been widely used in Europe as a result of trade union pressure to avoid the high levels of unemployment tolerated in this country.

Beyond the immediate economic advantages, work-sharing that prevents unemployment will have inestimable social benefits. It is impossible to assess just how costly the interruption of employment can be, especially in large cities with a concentration of ghetto conditions. We see the devastation caused by unemployment all around us, but we can only speculate on the ultimate consequences and costs - social and economic - that the dislocation caused by unemployment can have on crime, family stability, the social development of children, drug addiction, and other social problems. We will never be able to allocate sufficient resources to deal with such problems if we do not move to ameliorate conditions that create them. A minimal investment now in maintaining the employment of workers can save this state and the nation incalculable costs in social pathology that often has its roots in high unemployment rates.

Finally, work-sharing to maintain employment, instead of reducing the number of jobs through layoffs, also averts the potential for destructive competition for limited available jobs. In a

retrenching labor market, no problem is more difficult than job distribution. If government does not provide the leadership to make this distribution equitable, then workers themselves may be driven to the most direct forms of competition. We need only refer to the spectacle presented by the dispute over jobs in the Detroit Police Department, where competition between white and black police officers reached the level of open confrontation.

Federal Action

Federal action also is indicated. Eligibility rules vary from state to state. Workers on rotating layoffs or staggered shifts are eligible in some jurisdictions but not in others. In some states, funds already are dependent on federal financing. The logical extension of federal action is the enunciation of uniform national rules for unemployment insurance eligibility including coverage of wages lost through work-sharing. The International Union of Electrical Workers is actively sponsoring federal legislation that would provide partial compensation for the fifth day to employees working a four-day week.

In another direction, similar to federally-funded public employment programs, public funds could be used directly in support of work-sharing. Public employment programs have been constructed to serve only those workers who already have suffered the loss of a job. A more efficient, humane, and far less costly use of public funds would be to supplement the fifth day or other reduced-work situations. This would decrease the number of

potential candidates for traditional costly public employment programs, and also maintain continuous work opportunity without the need to process, train and place workers. Supplementing the earnings of workers in their regular employment avoids the conflict that often arises when some workers are laid off and others are hired under special federal programs for similar work. A special appropriation, analogous to CETA funds, should be created to test a variety of alternatives to layoffs.

Guidelines

Finally, the implications of Title VII of the Civil Rights Act of 1964 with respect to alternatives to layoffs are as yet unclear. The E.E.O.C. has failed to promulgate guidelines to deal with the critical questions posed by the current recession. Judicial decisions to date and pending court cases may have some impact, but the likelihood is that such impact will be limited to questions of constructive seniority in resolving specific conflicts between seniority and affirmative action. The existence of Title VII makes it possible to question layoff policies in a new light, a light which may have consequences that extend beyond the current implications for minorities and women, and may lead toward more effective national manpower policies to deal with cyclical variations in economic activity.

Management representatives at the Commission's conferences and at other forums as well expressed a need for

guidance. They are caught between the stipulations of union contracts and affirmative action agreements. Union leaders are wary of departing from their essential role of seeking improvements in all terms of employment for members, and fearful of jeopardizing their status as leaders by advocating a sharing of the hardships by all workers when the workers themselves did not construct the discriminatory systems of employment. Stanley Pottinger, Assistant Attorney General, speaking at the N.Y.U. conference stressed the need for E.E.O.C. guidelines.

Although a recession may not appear to be an auspicious period for manpower innovation, it usually has been at such times that major steps have been taken. This recession, with its hardships and with the doubts it has raised about the future of the American economy, can be a period of significant accomplishment. Until recently Americans have luxuriated in a vision of a constantly expanding economy, and until recently believed the economy was functioning better than it actually was, by ignoring those who seldom shared in the benefits. Now that many workers who considered themselves relatively invulnerable to economic vicissitudes are facing the problems that minorities and women have long endured, a reassessment is taking place. Unemployment probably will be a major political issue for some time, and, therefore, can provide the basis for the constructive measures recommended in this report. Work-sharing and other

alternatives to layoffs are admittedly emergency measures and not a substitute for a genuine full employment policy. But immediate action to minimize the impact of this recession can be a first step toward providing continuous employment for those who have gained access to jobs in periods of expansion.

* * *

Plaintiff's Appendix N - Alternatives to Layoffs

PARTICIPANTS

Thursday, April 3, 1975

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Thursday, April 3, 1975

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Governor's Task Force on Unemployment

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General Motors, Inc.

Alan R. Viani, Director of Research & Negotiations
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PARTICIPANTS

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Ivar E. Berg, Jr., George E. Warren Professor of Business
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Herbert Bienstock, Regional Director
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Eugene P. Foley, Chair
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James Kuhn, Professor of Business
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Plaintiff's Appendix N - Alternatives to Layoffs 65.

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Friday, April 4, 1975

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The Ford Foundation

Martin Shugrue, Vice President - Corporate Personnel
Pan American World Airways, Inc.

Phyllis A. Wallace, Professor
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Harry Wellington, Professor of Law
Yale Law School

AGENDA April 3-4, 1975
&
SUGGESTED TIME SCHEDULE

10:00 - 10:15 I. INTRODUCTORY REMARKS

Eleanor Holmes Norton

10:15 - 10:45 II. TEMPORARY OPTIONS FOR REDUCING LABOR COSTS OTHER THAN THROUGH LAYOFFS

Reduction of Work Hours

* plant/office shutdown for specified time per month
* shorter work week
* shorter work day
* elimination of overtime
* rotating layoffs
* furloughs

Solicitation of Individuals for Volunteered Reduction in Force or Hours

* unpaid leave of absence
* short work day or work week
* rescheduled vacations
* early retirement with or without incentives

Voluntary Reduction of Compensation

* voluntary wage cuts - evenly applied or graduated on the basis of salary
* voluntary deferral of raises, cost of living increases, merit increases, bonuses, automatic increases

Voluntary Reduction of Fringe Benefits

* medical disability, and life insurance - reduced level of benefits, increased employee contributions, increased deductible, elimination of dental, eye or other such coverage, etc.
* vacation days reduction

Voluntary Reduction of Fringe Benefits - cont.

* modification of profit-sharing plans
* reduced or deferred contributions to union welfare funds

Reduction or Elimination of Miscellaneous Benefits/Privileges

* company subsidized cafeteria
* tuition refund programs
* staff training and development programs
* expense accounts
* travel/relocation reimbursements
* executive benefits and privileges

Others may be added by participants

0:45 - 1:00 III. CRITERIA FOR ASSESSING RELATIVE MERITS OF THE OPTIONS

A. Criteria for determining the need to adopt such measures i.e., general and particular economic considerations for the industry, company, subdivision.

B. Applicability of the alternatives by type of industry, size of company, problems of administration.

C. Preference of employee groups, e.g., white collar, blue collar, professional, service.

D. Preference in terms of relative cost savings.

E. Criteria for determining duration and termination of temporary labor cost saving policies.

00 - 2:00 LUNCH - Luncheon will be brought in for participants.

00 - 3:30 IV. CRITERIA FOR AND MECHANICS OF IMPLEMENTATION

A. Company's internal decision-making process, e.g., changes in supervision, schedules, and logistics, and other business considerations.

B. Union or other employee group consultation, including collective bargaining contract considerations.

C. Strategy for presenting proposed policies - type of data needed, manner of presentation, use of outside intermediaries and experts.

D. Incentives to encourage employee cooperation and maintain employee morale.

E. Periodic reviews of cost-reduction policies and termination prospects with employees.

F. Policies regarding recall during transition to restoration of previous policies.

3:30 to close of session

V. ECONOMIC, SOCIAL AND LEGAL IMPLICATIONS

A. Need for subsidies such as C.E.T.A., Unemployment Compensation, tax benefits, employer bonuses post recession.

B. Need for regulatory agency (DOL - Wage & Hour Division, NLRB, etc., intervention and support.

* * *

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

THE GUARDIANS ASSOCIATION, et al., :

Plaintiffs, :

-against- :

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al., :

Defendants. :

- x

Civil Action No. 76 Civ. 1982 (R.L.C.)

PLAINTIFFS' PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RELIEF REQUESTED

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

THE GUARDIANS ASSOCIATION, et al., :

Plaintiffs, :

-against- : Civil Action No. 76 Civil. 1982 (R.L.C.)

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

PLAINTIFFS' PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RELIEF REQUESTED*

I

PROPOSED FINDINGS OF FACT

1. The layoffs in the New York City Police Department (hereinafter "NYCPD") which began on June 30, 1975 had a significant disparate adverse impact on black and Hispanic (hereinafter "Minority") police officers. Minority police officers have been laid-off at a rate of over twice the layoff rate for whites. Pl. Exhs. 12, 13; Tr. 149-152; Pl. Brief pp. 7-9.

2. Layoffs and recalls in the NYCPD are made in accordance with Sections 80 and 81 of the New York Civil Service Law. Section 80 provides that "suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointments on a permanent basis . . . ." Section 81(2) provides for "reinstatement to a vacancy in an

* In addition to references to the exhibits and testimony adduced at the hearing these proposed findings refer to Plaintiffs' Brief submitted herewith ("Pl. Brief").

appropriate position in order of original appointments." Police officers are appointed to the NYCPD in order based based primarily on their entry level examination score. Applicants who score highest on the exam are ranked first and therefore appointed first, those who score lowest are appointed last. Layoffs are made in strict inverse order of this ranking. Pl. Brief p. 7.

3. Defendants' entry level examinations, up to and including the 1970 examination, have been shown to have an adverse statistical impact on Minorities. Pl. Brief pp. 10-24

(a) A comprehensive study by the Rand Institute found that for entry level examinations Nos. 8046 and 0013, whites passed at consistently higher rates than Minorities. Minorities failed exam No. 8046 at a rate of 1.4 the rate of whites. Minorities failed exam No. 0013 at 3.5 times the rate of whites. The Rand study further found that whites comprised the overwhelming majority of persons in the top decile and Minorities the overwhelming majority of the last decile. Pl. Exh. 1; Tr. 999, 1000-1006, 1014, 1017, 1018, Pl. Brief pp. 10-19.

(b) A Department of Personnel study of entry level examination No. 7046 found that whites achieved a significantly higher mean score on the test than Minorities. Pl. Exh. 17; Pl. Brief pp. 20-21.

(c) A Department of Personnel study of entry level examination Nos. 9080 and 9081 found that whites passed the examination at a

rate of 1.6 times that of blacks and achieved a mean score significantly higher than that of Minorities. Pl. Exh. 19, Pl. Brief pp. 21-22.

(d) Statistics compiled by the Department of Personnel for examination No. 3014 (1973) indicate that Minorities failed the examination at 2.2 times the rate of whites. Of those who passed, whites generally scored in upper deciles, Minorities scored in lower deciles. The passing score of the exam was 70. Only 16.9% of those receiving scores of 90-99 were black or Hispanic. Nearly 70% of those with a score of 70-75 were black or Hispanic. Pl. Exh. 38; Pl. Brief pp. 22

4. Defendants' 5'7" height requirement, maintained until 1973, had a discriminatory impact on Hispanics, who are on the average shorter than whites or blacks. This 5'7" height requirement excluded 54.5% of Hispanic males, whereas only 19.1% of non-Hispanic whites and 22.1% of blacks were eliminated. Pl. Brief pp. 25-26.

5. Minorities are grossly underrepresented in the NYCPD. At present Minorities represent approximately 10% of the NYCPD. Pl. Exh 13. This is in stark contrast with the pool of applicants, which is 34% Minority and the New York City population, which is 37.7% Minority. Pl. Appendix E, Pl. Brief pp. 27-35.

6. Defendants failed to follow professionally accepted procedures for test preparation and validation. Defendants' test preparation fails to meet the standards established by the E.E.O.C. and the American Psychological Association. Pl. Exh. 2, 3; Pl. Brief pp. 36, 55-76.

(a) Defendants never prepared a proper job analysis. Pl. Exh 30, 36; Tr. 447, 465; Pl. Brief pp. 56-57.

(b) Defendants never validated any challenged examination according to any professionally accepted validation study. Pl. Exh. 2, 3; Pl. Brief pp. 55-76.

7. Defendants' policies and practices discriminated against Minorities in the NYCPD.

(a) Prior to 1970, there was no Minority recruitment by the NYCPD. Tr. 1238-1243, 1254-1255; Pl. Brief pp. 37-38.

(b) Defendants began the Minority recruitment program in 1972 as a result of the application of Title VII to municipalities, and the fact that Federal assistance became contingent on a showing of affirmative steps to increase Minority population. Pl. Exh. 32, Defs Exh. I.

(c) Defendant contracted with Psychological Corporation to prepare a new exam in an attempt to defeat litigation alleging discrimination in the NYCPD. Guardians v. Civil Service Commission, 490 F.2d 400 (2d Cir. 1973) ("Guardians I"). Defs. Exh. I, Pl. Exh. 35, 35(a); Tr. 235-246, 1194-1195, 1061-1062; Pl. Brief pp. 39-40.

(d) Defendants' purported recruitment efforts took place from 1971-1973, when there was a job freeze on all hiring for the NYCPD. Because of the job freeze, the Recruitment

and Retrieval Unit, established in 1971, could not engage in any hiring whatsoever. Tr. 1222, 1227-1229; Pl. Brief pp. 41.

(d) Any gains in Minority population which were made as a result of defendants' recruitment efforts were completely eliminated by the layoffs which began in June 1975. After those layoffs, the Minority population of the NYCPD was approximately 10% - the same percentage as that in 1970, before any recruitment efforts were made. Pl. Exh. 13; Tr. 1081; Pl. Brief p. 42.

(e) Defendants knew there was discrimination in the NYCPD and did nothing to correct it. It was well known and generally accepted in the NYCPD and Department of Personnel that the entry examinations and lack of recruitment efforts were keeping Minorities out of the NYCPD. Pl. Exhs. 17, 36; Tr. 1087, 1988, 1191; Pl. Brief p. 43.

(f) The policies and practices of the Department of Personnel discriminated against Minorities. The Department of Personnel knew that the entry level examinations which they prepared excluded Minorities from the police force. They nonethless blocked any real attempts to change these examinations. Tr. 1098, 1191, 1192, 1199-1200, 1201-1202, 1204-1205, 1212-1213; Pl. Brief pp. 44-46.

II

PROPOSED CONCLUSIONS OF LAW

1. Jurisdiction is conferred on this Court by Title 28 U.S.C.§ 1331 and 1343(3)(4) and by 42 U.S.C. § 2000e-5(f)(3).

2. This action is maintainable as a class under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

3. Defendants' discriminatory practices violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pl. Brief pp. 47-78.

(a) The layoffs which began on June 30, 1975 perpetuate defendants' past discriminatory practices in violation of Title VII. *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976); *cf. Cates v. Trans World Airlines*, 73 Civ. 5487 (S.D.N.Y. July 22, 1976); *Evans v. United Airlines*, No. 75-1481 (7th Cir. April 26, 1976); Pl. Brief 47-48.

(b) The fact that the layoffs were made pursuant to Section 80 of the New York Civil Service Law, a facially neutral ("last hired-first fired") seniority system, is no defense to discrimination under Title VII where the seniority system perpetuates prior discriminatory employment practices. *Franks v. Bowman Transportation Company*, 44 U.S.L.W. 4355 (March 24, 1976); *Acha v. Beame*, *supra*; *United States*

v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Pl. Brief 48-54.

(c) Many members of the plaintiff class were hired in 1973, after the effective date of Title VII. Their hirings - and the entry level examinations on which those hirings were based - violate Title VII. Franks v. Bowman, supra, Griggs v. Duke Power Co., 401 U.S. 424 (1970); Pl. Brief p. 54.

(d) Defendants' entry level examinations violate Title VII because they have a discriminatory impact and have not been shown to be job-related or properly validated. Griggs, supra; Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Pl. Brief pp. 54-68.

(1) Defendants' entry level examinations have not been shown to have content validity. No job analysis was done for the position of patrolman in the NYCPD. Pl. Exh. 36; Tr. 447. Without a proper job analysis an examination cannot be represented as having content validity. Pl. Exhs. 2, 3; Pl. Brief pp. 55-59.

(2) The examinations challenged in this action are not comparable to the 1973 examination prepared by the Psychological Corporation. There are significant differences between the

challenged the examinations and the 1973 examination in content areas and in the weight accorded content areas. Therefore, the challenged exams are not content valid even if the 1973 exam were determined to have content validity. Pl. Exh. 21-25; Defs. Exhs. J-Q; Tr. 513-515, 530-531; Pl. Brief pp. 59-62.

(3) The challenged examinations do not represent samples of job behavior and cannot, therefore, be held to be content valid. Pl. Exh. 2, 3; Tr. 866-867, 871-877;

(4) Defendants' entry level examinations do not have predictive validity because no correlation has been shown between performance on the examination and job performance. Pl. Exh. 2, 3; Tr. 378-379, 761, 889, 608-609; Pl. Brief pp. 69-77.

(5) Defendants' predictive validity study comparing performance on the entry level examinations with performance at the Police Academy does not meet professionally accepted standards. Pl. Exhs. 2, 3, 26; Defs. Exh. II, JJ; Tr. 853, 855, 893-896. The study does not validate the

challenged examinations because (a) success at the academy is not prodictive of success on the job and (b) these examinations were not designed to predict success at the police academy. Moreover, the curriculum at the Police Academy had changed significantly since the time of the challenged entry examinations. Therefore, it was improper to compare performance on entry examinations with performance in a curriculum at the police academy which was not even contemplated at the time of the challenged examinations. Defs. Exh. NN; Tr. 1143, 720-721; Pl. Brief pp. 69-77.

(e) Defendants' height requirement violates Title VII because it has a discriminatory impact and is not job related. Pl. Brief pp. 77.

(g) Defendants' layoffs violate Title VII because they have a discriminatory impact and are not job related. Pl. Brief pp. 78.

4. Defendants' discriminatory practices violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d which bars discrimination in any program receiving federal financial assistance. Defs. Exh. I; Pl. Brief 79-84.

5. Defendants' discriminatory practices violate the Revenue Sharing Act of 1972, 31 U.S.C. § 1221 et seq., which proscribes discrimination in any program receiving revenue sharing money. Pl. Brief 85-87.

6. Defendants' entry examinations violate the Fourteenth amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983.

(a) Plaintiffs have demonstrated the statistically discriminatory impact of the challenged layoffs, examinations and height requirement. Pl. Brief 88-90.

(b) Defendants' practices constitute intentional discrimination. Washington v. Davis, 44 U.S.L.W. 4789 (June 7, 1976). Intent to discriminate may be found where defendants knew that their action - or inaction - would have a discriminatory impact. Because defendants knew the forseeable consequences of their acts, i.e., that their layoffs, examinations and height requirement excluded Minorities, they must be held to have intended the discriminatory results of those practices. Pl. Exhs. 17, 36; Tr. 1093 1099, 1212; Washington v. Davis, supra, at 4792, 4800; Keyes v. School District No. 1, 413 U.S. 189 (1973); Hart v. Community School Board of Education, New York School District No. 21, 512 F.2d 37 (2d Cir. 1975); Local 189, United Papermakers v. U.S., 416 F.2d 980 (5th Cir.) cert. denied 397 U.S. 919 (1970); Pl. Brief pp. 90-100.

(c) "The controlling facts" in this case are significantly different from the facts in Washington v. Davis. (1) In Washington, supra,

the plaintiffs conceded that there was no discriminatory intent on the part of defendants. Here, defendants' efforts to increase the Minority population of NYCPD were not made in good faith. (2) The number of blacks on the police force in Washington D.C. was roughly equivalent to the number of blacks in the applicant pool. In the instant case, the applicant pool (34% Minority) is over three times as great as the number of Minorities in the NYCPD (10%). (3) The predictive validity study in Washington was substantially different from the study hastily prepared by defendants expressly for the purposes of this litigation. (4) The examination in Washington was significantly different from the examination at issue here in that the Washington examination was a qualifying test used to determine minimum verbal and comprehension skills, whereas here the examinations are competitive and used to rank police officers in determining their order of appointment, seniority and layoff. Pl. Brief pp. 101-108.

(d) Defendants have failed to sustain their constitutional burden of showing the job-relatedness of the challenged examinations. Plaintiffs' showing of adverse impact and discriminatory intent requires the defendants to demonstrate that their practices are necessitated by compelling

governmental interest. Loving v. Virginia, 388 U.S. 1, 9 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). Defendants have even failed to justify their actions by the lesser "job related" standards of Title VII. Pl. Brief pp. 108-109.

7. Defendants' entry level examinations violate Article 5 § 6 of the New York Constitution because they do not test for merit and fitness. Pl. Brief pp. 110-113.

III

PROPOSED RELIEF

1. Victims of employment discrimination are entitled to broad relief in order to "make them whole" to the extent possible, as intended by Title VII. Albermarle Paper Co. v. Moody, ("Albermarle"), 422 U.S. 405, 418 Franks v. Bowman Transportation Co., 44 U.S.L.W. 4355 (March 24, 1976). ("Franks"). Pl. Brief pp. 114-129.

2. Victims of employment discrimination are entitled to the seniority they would have had but for defendants discrimination. Franks, supra. Plaintiffs herein are entitled to a constructive seniority date of the median appointment date of the first examination taken. Franks, supra; Acha v. Beame, 75 Civ. 3128 (S.D.N.Y. July 16, 1976), 531 F.2d 648 (2d Cir. 1976); Chance v. Board of Education, 534 F.2d 993 (2d Cir. 1976), on rehearing (Appendix O). Pl. Brief p. 114.

3. Victims of employment discrimination are entitled to "front and back" pay. Back pay - the pay they would have received had they been accorded proper seniority and thus not laid off or recalled at an earlier date - is minimally just compensation for past discrimination. Franks, supra; Albermarle, supra. Front pay - pay from the time this Court orders the seniority to be reordered to the time plaintiffs return to work - is part of the "make whole" purposes of Title VII and should be awarded to victims of employment discrimination. Such a monetary award is

preferable to the alternative relief of "bumping" Franks, supra; Patterson v. American Tobacco Co., 11 E.P.D. ¶10,728 (4th Cir. February 23, 1976) (Re Appendix P); Pl. Brief pp. 121-124.

4. Plaintiffs herein have demonstrated the merits of their claim and the irreparable harm to them if defendants' discriminatory practices are allowed to continue. Triebwasser & Katz v. American Telephone and Telegraph, Docket No. 76-7095, Slip Op. 3753 (May 17, 1976); Sonesta International Hotel v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973). Therefore, an injunction shall issue pursuant to F.R.C.P. 65 (a) preliminarily and permanently restraining defenants from using any eligibility lists from any challenged examination fof layoff or recall within the NYCPD., (b) preliminarily and permanently restraining defendants from using any eligibility lists from any challenged examination for layoff or recall, (c) ordering defendants to restructure the seniority of Minority police officers to compensate them for defendants' past discriminatory acts. Pl. Brief pp. 125-129.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ, and FELIX E. SANTOS, individually and on behalf of all others similarly situated,	FINDINGS OF FACT and CONCLUSIONS OF LAW
Plaintiffs,	
-against-	
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individaully and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,	Civil Action No. 76 Civ. 1982 (R.L.C.)
Defendants.	

Defendants, by their attorney, W. BERNARD RICHLAND, Corporation Counsel of the City of New York, as and for their proposed findings of fact and conclusions of law with respect to the hearing for a preliminary and permanent injunction submit the following:

The Court is respectfully referred to the factual recitation in Defendants' post-trial memorandum which recites the testimony and exhibits presented at this hearing with transcript references.

* * * *

CONCLUSIONS OF LAW

A challenge on racial grounds of examinations for police officer prepared and administered prior to March 24, 1972 requires proof of intent or purpose to discriminate.

The plaintiffs' burden in such an action is not satisfied by proof of disparate impact alone. An Intent to discriminate from all the relevant operative factors surrounding utilization of a selection procedure must be shown by a preponderance of evidence. The burden of proof in the action never shifts to the defendant. The burden of going forward lies with defendant only after plaintiff has made this prima facie showing of intent to discriminate.

Defendants' burden is satisfied by demonstrating that the examinations are rationally related to the job of police officer. Examinations for police officer which test skills, knowledge and ability relevant to success at the Police Academy and on the job satisfy the test of rationality. Examinations which correlate positively with performance of a significant aspect of job performance are job-related. The constitutional standard does not require that an examination test for every aspect of job content or job performance. It is legally sufficient if critical aspects of content and performance are fairly evaluated.

Even if Title VII statutory standards apply, a criterion related validation of examinations demonstrating a high correlation between test performance and job performance at the academy satisfies that more rigorous standard. The plaintiffs have not demonstrated an intent

or purpose to disciminate by a preponderance of the evidence. The defendants, on the other hand, have demonstrated that the examinations are rationally related to the job of police officer. The proof satisfied the constitutional standard.

The defendants have shown that there is a correlation between test performance and job performance by a validation study. The proof satisfies the Title VII standard.

ON THE HEIGHT REQUIREMENT

The rationality of a minimum height requirement for police officer candidates prior to 1973 was supported by its virtual unanimous application in the law enforcement community, as well as by studies conducted of police performance throughout the United States. The issuance of Guidelines imposing the reqirement of performance validation studies on the job relatedness of a height requirement was intended to apply prospectively, and defendants have complied with that requirement by voluntarily abandoning the traditional height requirement prospectively.

Dated: September 3, 1976
New York, N.Y.

Respectfully submitted,

W. BERNARD RICHLAND
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Civil Action No.
76 Civ. 1982
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION
OF THE NEW YORK CITY POLICE
DEPARTMENT, INC., et al

Plaintiffs,
-against-
CIVIL SERVICE COMMISSION OF
THE CITY OF NEW YORK,

Defendants.

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

W. BERNARD RICHLAND
Corporation Counsel,
Attorney for Defendants
Municipal Building,
566-2183/2192 *New York, N. Y. 10007*

Due and timely service of a copy of the within
is hereby admitted.

New York, ...19.....

.....
Attorney for

To

....., *Esq.,*
Attorney for

3-30M-518067(73) 346

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ, and FELIX E. SANTOS, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK. DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALPHONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Defendants.

----------x

OPINION

76 Civ. 1982 (RLC)

APPEARANCES:

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By: Rosemary Carroll
Paul L. Brennan
Of Counsel

ROBERT L. CARTER, D.J.

Statement of the Case

This action challenges the legality of the hiring and firing practices of the New York City Police Department ("NYCPD"). Jurisdiction is based on Title 28 U.S.C. §§ 1331 and 1343(3), (4) and 42 U.S.C. §§ 1981, 1983 and 2000e-5(f)(3).[1] Plaintiffs allege that defendants' practices violate the Fourteenth Amendment, 42 U.S.C. § 1981 and 1983 and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*[2] Plaintiffs have moved for a preliminary injunction restraining the NYCPD from firing or recalling any police officers until seniority lists are reordered to accord plaintiffs the seniority they would have had but for defendants' discriminatory practices. Plaintiffs also seek certification of a class consisting of black and Hispanic officers who were subject to layoff in June, 1975. For the reasons set forth below, plaintiffs' motions are granted.[3]

Procedural Background

This action was commenced May 3, 1976, by an order to show cause seeking a temporary restraining order and a preliminary injunction.

The application for a temporary restraining order was denied. A hearing on the application for a preliminary injunction was held on May 12, 1976. At the hearing, defendants moved to dismiss the complaint on the grounds of statute of limitations, laches, and lack of subject matter jurisdiction. Their motion was denied, and the

hearing commenced. It continued intermittently until July 29, 1976.

Having heard that the NYCPD intended to recall previously laid off police officers, plaintiffs in the early part of July renewed their application for a temporary restraining order barring such recall pending determination of the rights of the discharged black and Hispanic police officers in this litigation. The court denied this application on the basis of an affidavit of Michael J. Codd, Police Commissioner, which recited that all recalled officers were to be notified that their rights to employment were subject to any determination that might be made in this pending llitigation.

Factual Background

Plaintiffs are black and Hispanic police officers on layoff since June, 1975. They allege that the NYCPD's use of its pre-1973 entry level examinations and its former requirement that all police officers be 67 inches or taller discriminated against them, and that but for this discrimination they would have accrued sufficient seniority to withstand being fired. Defendants are the NYCPD, the New York City Department of Personnel, whose staff prepare and administer the examinations, and the Civil Service Commission, which prescribes rules for administering the civil service laws.

Because of the fiscal crisis affecting the entire city, the NYCPD was required to cut its budget by three percent. As a result, 2,864 police officers were discharged in June, 1975, pursuant to the last-hired, first-fired seniority system existing in the NYCPD. Plaintiffs complain that these terminations, 21.5 percent of which were minorities,[4] perpetuate defendants' past discriminatory practices, and violate the strictures of the Fourteenth Amendment, Title VII and 42 U.S.C. §§ 1981 and 1983.

Class Action Certification

For class action treatment to be appropriate, all the requirements of subdivision (a), and one of the alternative requirements of subdivision (b), of Rule 23, Fed. R. Civ. P. must be satisfied.[5] There is little doubt that plaintiffs have met the first three requirements of Rule 23(a).

1. The Numerosity Requirement

The proposed class consists of all black and Hispanic New York City policemen currently on layoff who would not have been furloughed but for defendants' allegedly discriminatory employment practices. Plaintiffs make the uncontroverted allegation that the class numbers between 200 and 600 blacks and Hispanics. Given these figures, the numerosity requirement is clearly met. Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972); Ste. Marie v. Eastern R.R. Ass'n, _____ F. Supp. _____ (S.D.N.Y. 1976) (Carter, J.).

2. Common Questions of Law or Fact

Race discrimination cases, by their very nature, involve behavior that affects a group of people. Rodriguez v. East Texas Motor Freight Co., 505 F.2d 40, 50 (5th Cir. 1974); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). Plaintiffs here claim that defendants' practice of discharging police officers based on their seniority violates Title VII and 42 U.S.C. §§ 1981 and 1983 by perpetuating discrimination effected by the use of racially biased entry level examinations and a discriminatory height requirement. It is clear that these claims:

> "not only can, but most appropriately should be decided as a class action since 'the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion, or national origin.' ..."

Hecht v. Cooperative for Am. Relief Everywhere, Inc., 351 F. Supp. 305, 312 (S.D.N.Y. 1972) (Lasker, J.) (citations omitted).

3. Representative Parties' Claims Typical of the Claims of the Class

The claims of the representative parties are typical of most of the class. The individual plaintiffs claim to be on layoff either as a result of defendants' discriminatory use of entry level examinations or as a result of defendants' discriminatory height requirement. Plaintiff organizations include members who have been victims of both these practices. Together, their claims range over the totality of defendants' challenged employment practices. Thus, the typicality standard is met.

4. Fair and Adequate Protection of the Class' Interests

In Meersay v. First Rep. Corp. of Am., 43 F.R.D. 465, 469 (S.D.N.Y. 1968) Judge Metzner held that:

> "the requirement of adequate representation comprises only two elements: (a) that the interests of the representative party must coincide with those of the class; and (b) that the representative party and his attorney can be expected to prosecute the action vigorously. Doglow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968)."

Defendants presumably contest the adequacy of plaintiffs' representation by contending that in Guardians Ass'n of New York City Police Dep't v. Civil Serv. Comm'n, 72 Civ. 928 (S.D.N.Y., July 16, 1973) (Ryan, J.) ("Guardians I"), a suit brought under 42 U.S.C. § 1983, plaintiff associations took a position incompatible with the one taken here. Defendants argue that in the previous action these associations sought a permanent injunction against the use of lists predating 1972 for appointments to the Police Department. Therefore, it is claimed, since the individual plaintiffs in the instant case obtained appointments from pre-1972 lists "precisely because the relief sought by these associations was denied in Guardians I --- [the] associations represented interests directly adverse to [those of] the individual plaintiffs herein." Def's. Post-Trial Memo. at 5. This argument is patently without merit.

In the earlier suit, plaintiff sought to enjoin the use of pre-1972 officer eligibility lists out of the fear that a disproportionately low number of minorities would be hired due to the discriminatory impact of the examinations from which the lists were prepared. This is made clear from plaintiffs' alternative request to establish a quota of one minority appointment for every white appointment. The relief sought was denied since it appeared that the lists were being exhausted and all the plaintiffs would be hired.

The premise of that suit is consistent with that asserted here. In both cases, the thrust of plaintiffs' attack is directed toward the use of employment requirements which discriminate against minorities. Accordingly, I am convinced that the interests of the plaintiff associations coincide with those of the class, and based on the extensive work already conducted by plaintiffs, they can be expected to prosecute the action vigorously.

Defendants also argue that plaintiff Santos could not have been appointed as a police officer until he was a United States citizen and that he did not become a citizen until the time of a hiring freeze; therefore he is unable to show that he could have been appointed earlier than he actually was. Plaintiff Perez, defendants assert, challenges the height requirement but has never failed a police officer examination and does not claim the written examination discriminated against him. To the extent these assertions suggest inadequate representation or atypicality of claims, they pose no bar to certification of the class. They may present individual questions which will determine each individual's right to recovery, but Rule 23 gives the court the power to consider individualized problems if and when they appear. Ste. Marie v. Eastern R.R. Ass'n, supra. In any event, since plaintiff organizations are suitable representatives, the potential disqualification of Santos and Perez poses no threat to the viability of this class suit.

5. Action or Inaction on Grounds Generally Applicable to Class — Appropriateness of Injunctive or Declaratory Relief (Rule 23(b)(2))

Plaintiffs have asked for declaratory and injunctive relief that would prevent defendants from perpetuating allegedly discriminatory hiring practices. Plaintiffs also seek damages. This situation is well-suited for class action treatment under subdivision (b)(2) of Fed. R. Civ. P. 23, since a finding that defendants' practices are unlawful will necessarily affect all minority police officers. See Advisory Committee Notes to Fed. R. Civ. P. 23, and cases cited

therein; Leisner v. New York Tel. Co., 358 F. Supp. 359, 373 (S.D.N.Y. 1973); Rosario v. New York Times, 10 E.P.D. ¶ 10,450 P. 5944 (S.D.N.Y. 1975). A claim for damages may properly be considered in a (b)(2) action as long as the monetary relief is not predominant. Almenares v. Wyman, 334 F. Supp. 512, 519 (S.D.N.Y.), modified 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972); Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 85 (S.D.N.Y. 1973).[6]

Accordingly, plaintiffs' motion for certification of a plaintiff class is granted.

Entry Level Examinations

In order to be appointed a police officer, an applicant must, among other things, achieve a 75 percent score on a written examination. Individuals who pass this examination are ranked on an eligible list in order based on their scores.[7] The highest ranked are the first to be given available jobs. The lowest ranked are the last to get jobs, and consequently are the first to be fired when there are layoffs. Plaintiffs contend that the use of these examinations prior to 1973 violated both their constitutional and statutory rights.

1. Constitutional Claims

In Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court upheld the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department even though the test had a discriminatory impact in screening out black candidates. The Court of Appeals had declared a lack of discriminatory intent irrelevant to establishing a constitutional violation. The Supreme Court reversed, holding that the circuit

court "erroneously applied the legal standards applicable to Title VII cases[8] in resolving the Constitutional issue before it," viz., whether the use of the qualifying examination invidiously discriminated against blacks and hence denied them their due process rights contrary to the commands of the Fifth Amendment. The Supreme Court continued:

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups .... But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."
> (citation omitted)

Id. at 239. The rule in other equal protection cases is likewise a requirement that plaintiffs show intentional discrimination, not merely discriminatory impact. Id. at 239-41. It follows that §§ 1981[9] and 1983[10] require the same showing.[11]

While an invidious discriminatory purpose may often be inferred from a practice which affects a definable minority race or group more than the majority, disproportionate impact "is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." Id. at 242. In the instant case, while the discriminatory impact of entry level examinations seems clear enough, the tests used by the NYCPD, like the examination upheld in Washington v. Davis, appear to be facially neutral and "rationally may be said to serve a purpose the Government is constitutionally empowered to pursue." Id. at 246.

Plaintiffs attempt to show discriminatory intent primarily from the

fact that instead of administering a general qualifying examination, the NYCPD used entry level tests which it knew had a discriminatory effect in screening out minority candidates. The proof of intent offered by plaintiffs here differs little from that before the Supreme Court in Washington v. Davis and accordingly must be deemed insufficient.

Defendants here were constrained by the New York State Constitution, Article § 6 and the Civil Service Law § 50 et seq. to select employees for civil service positions based upon individual merit and fitness, to be determined, where practical, by competitive examination. The position of police officer is a competitive title, and appointments are made from eligibility lists compiled on the basis of ratings received by the candidates on the competitive portions of the examinations. Civil Service §§ 50(6) and 61. Absent a showing that the entry level examinations were purposely designed to keep minorities out of the police force, Washington v. Davis requires that such procedures be sustained even if they have the result of screening out minorities.

Defendants have proffered evidence of recruitment efforts on their part to demonstrate their good faith, including the creation of a recruitment squad within the department's Personnel Bureau in 1967; participation in, and adoption of recommendations made by, a nine month Rand Institute Study in 1968-69; the use of a federally funded "Community Service Office" program, employing mostly minorities in quasi-police positions for the purpose of absorbing them into the police officer ranks; a cadet program begun in 1966 which paid minority youths receiving training in the Police Academy; and the establishment of an Equal Employment Opportunity office. As a result of their commitment to increase minority representation, defendants claim that 23 percent of all new police recruits hired since 1973 were minority members.

Plaintiffs challenge the defendants' assertion of bona fides with respect to minority recruitment. They argue that prior to 1970 the NYCPD made no real efforts to increase the number of minority police, nor was support given to recruitment efforts made by plaintiffs. Moreover, plaintiffs charge, the police department's recruitment program began in earnest in 1972, only after Title VII became applicable to municipalities and litigation was threatened. Finally, it is argued, defendants' recruitment efforts began after a freeze was placed on hiring, and whatever gains had been made were later wiped out by the layoffs.

Even were these allegations enough to controvert defendants' evidence of good faith with respect to recruitment, they are nonetheless insufficient to meet the intentional discrimination requirements of Washington v. Davis. Mere absence of recruitment efforts, by itself, is not equivalent to an intent to discriminate. Also, even if the police department's stepped-up recruiting program can be directly linked to the threat of litigation after Title VII became applicable to municipalities, this alone is still no evidence of discriminatory intent. The applicability of Title VII to municipalities would establish prima facie liability on the part of the police department upon a showing that its hiring practices had a discriminatory impact regardless of intent. Taking steps to avoid such liability cannot justifiably be characterized as tantamount to admitting discriminatory intent. Nor is it reasonable to impugn the police department's recruitment efforts after 1972 because the City's financial problems required budget cuts and the imposition of a job freeze. The fact that subsequent layoffs by seniority eliminated recruitment gains may make out a Title VII cause of action, but it cannot stand for proof of invidious discrimination proscribed by the 14th Amendment to the Constitution of the United States under the Washington v. Davis rationale.

The strongest evidence of defendants' discriminatory intent was the testimony of Police Commissioner Murphy and Deputy Commissioner Ward. Murphy testified that the NYCPD and the Department of Personnel did not try as hard as he would have liked to increase minority representation on the police force, but he never stated that either actively discriminated against blacks and Hispanics. In fact, he characterized the department's actions to recruit and retrieve minorities at least during his tenure (Oct., 1970 to May, 1973) as good faith efforts. Tr. 1130-32. He also stated that there was "a Civil Service effort to improve as much as it could the written examination." Tr. 1132.

The testimony of Deputy Commissioner Ward is a more unqualified condemnation of the defendants' motivations. What he has characterized as intentional discrimination, however, is the complacency of officials in the police department and the Department of Personnel with respect to the status quo and their failure to take more active steps toward increasing minority representation. Taken as a whole this testimony falls far short of establishing liability under the Constitution or §§ 1981 and 1983.

2. Title VII Claim[12]

a. Applicability of Title VII

Plaintiffs challenge the job-relatedness of all pre-1973 entry level examinations.[13] However, the specific harm complained of in this action is not the decision to hire or not to hire based on the results of these pre-1973 examinations, but rather the decision to layoff police officers as a result of budget cuts. The layoffs, as indicated previously, were made in 1975 pursuant to a last-hired, first-fired seniority system which no one attacks as discriminatory in any way. Defendants claim that since the only acts complained of took place prior to the date Title VII was made applicable to municipalities, the standards of Title VII do not apply to this case.[14] Additionally, defendants contend that plaintiffs have not

met the procedural requirements of Title VII, since neither any individual plaintiff nor the Guardians and Hispanic Associations filed timely charges with the Equal Employment Opportunity Commission ("EEOC").[15]

Decisions in this circuit and elsewhere, however, do not support defendants' position. To the contrary, the layoff of police officers in 1975 brings the pre-1972 alleged discriminatory practices within the scope of Title VII. In Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), two women who were formerly police officers brought suit under Title VII and under the Fourteenth Amendment, alleging that threatened NYCPD terminations unlawfully discriminated against women.[16] The plaintiffs in Acha alleged, inter alia, that the facially neutral seniority system[17] perpetuated the past discriminatory practices of the Police Department, and that the layoffs violated their Title VII statutory rights.

Acha did not specifically deal with the contention raised here by defendants that Title VII does not apply since the only post-Act practice complained of is the application of a neutral seniority system. Nevertheless that contention was implicitly rejected by the Court of Appeals.

Plaintiffs' complaint had been dismissed by this court (Duffy, J) primarily on the ground that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) excepts from the sanctions of Tile VII the application by an employer of "different terms, conditions or privileges of employment pursuant to a bona fide seniority ... system." Judge Duffy had also held that section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), protected the defendants since to grant plaintiffs' requested relief would constitute unlawful preferential treatment on the basis of sex.

The Court of Appeals reversed, holding that neither section 703(h) nor 703(j) of Title VII insulated the defendants from a valid Title VII claim. The court stated:

> "If a female officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), since it is based on sexual discrimination. ...
>
> Until the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered 'bona fide' and in fact represents a continuation of past intentionally discriminatory practices, and this falls outside the terms of section 703(h)." 531 F.2d at 654-55 (emphasis added).

The court also disagreed with Judge Duffy's holding as to Section 703(j) and held instead that an award of seniority to those who had been actually discriminated against would not constitute a "preference", but would rather be a remedial action well within the power delegated the courts by Title VII. Acha, supra, at 656.

Although defendants' argument here is a variation of that used in Acha, the point remains the same. If defendants' position in either case were correct, Title VII would be unavailable to individuals seeking to remedy past discrimination unless they could show discrimination in hiring by a municipality which occurred after the passage of the March 24, 1972 amendment to Title VII. This position has been rejected by federal courts on numerous occasions. In Griggs v. Duke Power Company, 420 F. 2d 225 (4th Cir. 1970), rev'd in part on other grounds 401 U.S. 424 (1971), it was expressly held that while Title VII was intended to have prospective application only, it did provide relief based on pre-Act discrimination if there are present and continuing effects of such discrimination. 420 F.2d at 1230. See also, Local 53 of Int'l Ass'n of Heat and Frost Insulation and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC, 282 F. Supp. 39 (E.D. La. 1968), aff'd, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); Cates v. Trans World Airlines, _____ F. Supp. _____, Civ. No. 73-5487 (S.D.N.Y., July 22,

1976) (Brieant, J.).

The Supreme Court provided support for the lower court's position on the question. The Chief Justice in his opinion in Griggs states:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an indentifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." 401 U.S. at 429-30.

Griggs and the cognate cases all involved the application of the pre-1972 version of Title VII. Nevertheless, their rule applies by analogy to the instant case. As this court has recently held:

> "[I]f the plaintiffs allege that [defendants] engaged in activities prior to the effective date [of the 1972 Amendment] which had a continuing discriminatory effect past the effective date, those continuing effects constitute a violation of the Act and give rise to a cause of action. Essentially, it was the obligation of governmental employers after the effective date of the 1972 amendments to examine their past activities to ensure that any discriminatory effects of those activities did not continue in violation of the Act."

Melani v. Board of Higher Educ. of the City of New York, 12 EPD ¶ 11,068 at 4962 (S.D.N.Y. 1976) (Gagliardi, J.).

Defendants correctly point to Monell v. Department of Soc. Servs. of the City of New York, 532 F.2d 259 (2d Cir. 1976) as establishing the circuit rule in respect of the "retroactivity" of Title VII. Monell involved a claim by female employees of the New York City Department of Social Services and of the New York City Board of Education that rules and regulations of the city agencies which formerly compelled pregnant employees to take unpaid leaves of absence before

medical reasons required any absences, were, inter alia, violative of Title VII. The court (Metzner, J.) had dismissed the Title VII claims for back pay covering the periods which plaintiffs alleged they could have been working but for the challenged rules. The dismissal was based on the court's determination that the 1972 amendment to Title VII could not be applied retroactively, and the fact that all the acts of discrimination complained of had occurred prior to the 1972 amendment.[18]

The Court of Appeals affirmed, holding:

> "[T]he 1972 amendment to Title VII does not apply retroactively so as to permit an award of back pay against the city in this case. The same law, Publ. L. No. 92-261, section 2(1) of which amended the definition of 'person' to include 'governments, governmental agencies [and] political subdivisions,' also struck out in section 3 the exemption for the employment of individuals engaged in educational activities of non-religious educational institutions. In Weise v. Syracuse University, 522 F.2d 397, 410-11 (2d Cir. 1975), we met the question whether Title VII was applicable to discrimination occurring before the lifting of the exemption for educational institutions. We held that it was not retroactive, for it was 'a statute creating new rights where none had previously existed' .... We see no valid ground for distinguishing the sex-discrimination claim in Weise [here ... where] entirely new substantive rights were created by the amendment to Title VII."

532 F.2d at 261-62. See also Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632, 639 n.8 (1974); Melani v. Board of Higher Educ. of the City of New York, supra.

Monell, however, does not deal with the issue of equitable relief where an employer's post-amendment practice perpetuates and continues pre-amendment discrimination, as is alleged here. It merely limits the Title VII of a municipality to damages sustained by victims of discrimination after the 1972 Title VII amendments.

Monell precludes the plaintiffs from recovery of money damages

under Title VII which resulted from defendants' unlawful hiring practices. It, does not, however, bar equitable relief made necessary because of pre-amendment discrimination. Indeed, such a bar to equitable relief would run totally counter to the congressional purpose not to effectuate a freeze of employees in positions to which they were relegated by past discrimination predating enactment of the fair employment practices legislation. Griggs v. Duke Power Co., supra, 401 U.S. at 429-30; Quarles v. Philip Morris, Inc., 297 F. Supp. 505, 516 (E.D. Va. 1968).

b. Title VII Standard

In Griggs v. Duke Power Co., supra, the Supreme Court held that Title VII forbids the use of employment selection practices that have a racially discriminatory impact unless the employer meets "the burden of showing that [the selection practices have] ... a manifest relation to the employment in question." Id. at 432. This burden arises only after the complaining party or class has made out a prima facie case of discrimination. The Court held in Albemarle Paper Company v. Moody, 422 U.S. 405 (1975) that a prima facie case is made out if the complainants can show "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." Id. at 425. See also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A showing of discriminatory purpose need not be made under Title VII. Griggs, supra; Albemarle, supra. Based on the evidence adduced at the hearing I find that while the plaintiffs have made a prima facie showing of discrimination, the defendants have not met their burden of showing job-relatedness.[19]

c. Disproportionate Impact

At the May 24, 1976, hearing the court ruled that plaintiffs had

sustained their burden of establishing that the examinations had a racially discriminatory impact, and that the burden therefore shifted to defendants to show job-relatedness. The following constitutes the court's basis for so ruling.

In the wake of Guardians I, the Rand Institute ("Rand") was authorized by all parties to that lawsuit to conduct an independent study to determine the distribution by race of civil service scores on NYCPD entry level examinations #8046, given July 20, 1968, and/or #0013, given May 9, 1970. The study was paid for by the City of New York and the Fund of the City of New York.

Rand attempted to determine the respective passing rates of whites, blacks and Hispanics[20] on NYCPD entry level examination #8046, the earliest examination with an eligibility list still in use, and examination #0013, the latest examination then in use. Both parties to Guardians I were aware that these were the only examinations to be studied.[21]

Before Rand could complete such a study it had to determine the race of those applicants who took these examinations. Because the NYCPD did not keep systematic records of the race of the applicants, Rand was forced to rely upon indirect methods of indentification. Five different sources of data were used: (1) NYCPD records giving the race of about 30 percent of the applicants taking each examination; (2) results of a questionnaire inquiring into race which was mailed to nearly all persons who took the examinations; (3) a compilation of approximately 8,000 surnames compiled by the U.S. Bureau of Census with which the subjects' names were compared; (4) census tract data, evidencing racial residential concentration with which the subjects' addressed were matched; and (5) a telephone sample of the subjects whose race remained unknown after the NYCPD data and the questionnaire data were on hand.[22]

Using these data, Rand estimated the numbers of whites and blacks

who took the examinations in two ways, and the number of Hispanics in three.[23] These estimates, which Rand found to fall well within the range of acceptable statistical error, indicated that about 71 percent of the examinees of both examinations were white, and 29 percent were minority-group members (a larger proportion of this 29 percent were Hispanics for examination #0013 than for #8046).

Similarly, Rand used three methods to estimate the distribution by race of the scores on examination #8046 and #0013.[24] Under each method the result was substantially the same. Whites consistently passed at higher rates than minorities and consistently comprised the overwhelming majority of individuals in the top deciles. Minorities consistently comprised the overwhelming majority of individuals in the bottom deciles. In summarizing its findings, Rand stated that:

> "[w]e have found substantial and statistically significant differences by race in the distributions of exam scores for whites as compared to blacks and Hispanics for both exam #8046 and exam #0013. Blacks and Hispanics scored lower than whites and failed at higher rates - No passing grade could have been set to result in equal proportion of whites and minority-group members passing. These findings were confirmed by three different methods of data analysis." Rand Report at 46.[25]

At the hearing, Dr. Cohen testified that given a racially neutral text the chances of this result occurring were statistically less than one in a billion. Tr. 45-46. Rand Report, Pl's. exh. 1 at vi.

Because of the similarity of results for the studies of the two examinations, which were given two years apart, Rand concluded that it was

> "confident that the patterns observed for exam #0013 are not unique to that exam but are most likely typical of the patterns for all recent civil service patrolmen's exams."

Rand Report at 38; Testimony of Dr. Cohen, Tr. 47, 48 .

Plaintiffs assert that there is additional evidence which supports their

claims of racially discriminatory impact.[26] Because the court believes that the results of the Rand Report are sufficient to make out a prima facie case, however, this other evidence need not be considered.[27]

Furthermore, it is unnecessary to determine whether plaintiffs or defendants are correct in their assertions as to the proper makeup of the applicant pool. Plaintiffs seek to prove that minorities are grossly underrepresented in the NYCPD. Defendants contend that the statistics demonstrate otherwise. However, even if the result were overrepresentation of minorities, that would have little relevance to the Title VII issue presented here. All that is challenged in this case is the selection practice that occurs at the point that members of the applicant pool actually show up and take the entry level examinations. Even if, as defendants contend, the percentage of minority policemen is nearly equivalent to the percentage of minorities in the relevant applicant pool, the fact remains that utilization of the examinations challenged has had the effect of significantly decreasing what might otherwise be the number of minorities who would under NYCPD procedures be eligible for appointment. The key question that must be be faced is given the number of whites, blacks and Hispanics who tookthe NYCPD entry level examinations, whether the number who passed or failed and the scores they achieved were to a legally significant degree determined by their race.[28]

Defendants have at all times contested the statistical basis for the finding of a prima facie case of discrimination. At the May, 1976 hearing they called Professor Alan Gross, an associate professor in the department of educational psychology at the graduate center of City University. Dr., Gross testified that he did not "think any conclusions at all can be drawn from [the Rand] study because of the methodology used. ..." Tr. 578. Dr. Gross proceeded to analyze each of the methods used by Rand to reach its conclusions and found each

severely flawed. In analyzing Rand's use of the census records, for example, Dr. Gross stated:

> "[Rand] looked at a tract, a region. Supposing this region, you find according to census records that 90 percent of all individuals are black and 10 percent are not— this is known from census records — and therefore what the authors of the report tried to do was, they looked at one of those people they couldn't contact in the telephone survey, but they knew what tract, census tract this person lived in. They said if this person lives in a census tract that is 90 percent Hispanic, then we can assume that this person is Hispanic and although we might be wrong, 10 percent, that's not an unreasonable rate and we'll call anybody in this census tract, will assume is Spanish.
>
> There is a big problem with that and a flaw in that kind of reasoning. ... A person from a tract 90 percent Spanish, is Spanish. If a person comes from the tract and is taking the police examination, what are the chances he is Spanish? If a greater proportion of whites apply than do Spanish individuals, then the probability is not .90 more. It goes down considerably." Tr. 591-93.

Dr. Gross was similarly critical of the other methods used by Rand in its study. As another example, Dr. Gross stated that there was no theoretical basis to extrapolate from the results of the study of the two examinations a conclusion relating to the results of all the examinations that were given in between. In short, Dr. Gross tesified that the Rand report was based on "[a]ssumptions that there is no basis for defending., They may be right and they may be wrong." Tr. 619.

Dr. Gross' opinions are of course quite relevant. I am not persuaded, however, by his arguments. Although the Rand study may be based in minor part on certain unproved assumptions, viewed as a whole its findings are clearly trustworthy. As the report indicates, its authors recognized that they were confronted with certain methodological problems. Accordingly, they used three different statistical methods in order to ensure that their findings would be accurate. Dr. Gross's criticisms might have been telling had Rand's conclusions

been based on only one of the methods used. However, regardless of which of the three statistical methods the authors used, they came up with substantially equivalent results. I have no hesitancy in concluding that this consistency is more than sufficient to remove any doubt as to the reliability of Rand's methods and findings.

My faith in the accuracy of Rand's findings is based additionally on the fact that the Rand study was conducted entirely independently of the parties to this litigation, and that there is nothing whatsoever to indicate that the authors of that study had any desire or prediliction to reach a particular conclusion. Moreover, there can be little dispute that the Rand study was conducted in a thoroughly professional manner by experts in the field. Indeed, although the defendants are not estopped from challenging the methodology used by Rand,[29] it is significant that the defendants trusted Rand's technical capabilities sufficiently to authorize its study of the problem in the first place.

In sum, I find that the results of the Rand study are reliable and by themselves are sufficient to establish a prima facie case.

d. Defendants Have Not Shown the Tests to be Job-Related

Since plaintiffs have established a prima facie case of discrimination, defendants must show that the tests in question are job-related. Griggs v. Duke Power, supra; Albemarle Paper Co. v. Moody, supra; Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). To do so, defendants must show that the entry level examinations "are demonstrably a reasonable measure of job performance." Griggs, supra, at 436.

The parties agree that there are three generally accepted measures of test validation — content, construct and criteria-related validity.[30] Defendants

contend that the NYCPD exams are demonstrably validated according to both the content and criteria-related standards.

1. Content Validity

In Vulcan Soc'y of the New City Fire Dep't, Inc. v. Civil Serv. Comm'n, 360 F. Supp. 1265 (S.D.N.Y.), aff'd, 490 F.2d 387 (2d Cir. 1973), Judge Weinfeld described content validity:

> "An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job."

360 F. Supp. at 1274 (footnotes omitted). See Jones v. New York City Human Resources Administration, 391 F. Supp. 1064 (1975); testimony of Solomon Weiner, Tr. 373, testimony of Dr. Barrett, Tr. 866.

Although generally considered less reliable than criterion-related validation, content validation will satisfy the employer's burden of showing job-relatedness. Vulcan, supra; Jones v. New York City Human Resources Administration, supra; EEOC Guidelines, supra, 29 C.F.R. at § 1607.5(a).

The EEOC has stated that where an attempt is made to demonstrate the content validity of an examination, evidence of validity should be

> "accompanied by sufficient information from job analysis to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) .... Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job."

EEOC Guidelines, supra, 29 C.F.R. at § 1607.5(a) (emphasis added). See American Psychological Association Standards ("APA Standards"), E 12.4, Pl's. exh. 3. As defined by Judge Weinfeld, a job analysis is a "thorough survey of the relative importance of the various skills involved in the job in question and the degree of competency required in regard to each skill. It is conducted by interviewing workers, supervisors and administrators; consulting training manuals; and closely observing the actual performance of the job.". Vulcan, supra, 360 F. Supp. at 1274; Kirkland v. New York State Dep't of Correctional Services, 374 F. Supp. 1361, 1373 (S.D.N.Y. 1974); Jones v. New York City Human Resources Administration, supra, 391 F. Supp. at 1077. Where an examination is prepared on the basis of a valid job analysis it should be content valid — i.e., test in proper relative measure the key areas of knowledge and ability involved in the actual job for which the examinees are applying. Conversely, where an examination is prepared without benefit of a job analysis, or on the basis of an inaccurate job analysis, it will no doubt lack content validity. Only chance will provide otherwise, and in the absence of a job analysis the burden of persuasion in demonstrating the job-relatedness of a challenged examination becomes even greater than is normally the case. Vulcan, supra, 490 F.2d at 395-96; Jones, supra 391 F. Supp. at 1076-77 (unless the job analysis accurately describes the content of the job, the content of the examination is likely to be seriously distorted).

Defendants have never introduced in evidence any formal job analysis, and as I stated at the June 30, 1976 hearing, their failure to do so shall be taken as evidence that no written job analysis was ever prepared. Tr. 465. Nevertheless, defendants contend that the "job-relatedness of [the examination in question] is supported ... by the method of preparation ...." Def's. Mem. at 126. It

appears that by this statement defendants are making two assertions: (1) in light of the test preparation procedures they followed, their failure to conduct a job analysis is irrelevant in respect of the burden of persuasion they must meet; and (2) the test preparation procedures taken were so professional as to constitute proof of job-relatedness, or at least to lessen their burden of persuasion in showing job-relatedness. See also Def's Mem. at 43.

The evidence, however, does not support defendants' position. Solomon Weiner, former director of examinations for the Department of Personnel, testified that the actual preparation of the examinations in issue encompassed review of files of previous tests; review of materials available in the library of the Bureau of Examinations; review of the Patrol Guide rules giving the procedures of the Police Department; contact with the Police Department concerning any special conditions warranting particular attention; the drafting of a notice of examination; and finally the construction of the actual test itself, using the various material described above.[31] While the use of such procedures no doubt indicates a good faith effort to construct a valid test, it cannot compensate in any way for a failure to construct the test based on a proper analysis of a police officer's duties. It is particularly noteworthy that defendants have presented no evidence that the test preparations followed included any regular program of field visitations or observations. Given the absence of such a program, it is impossible for me to understand how even the most conscientious procedures imaginable could, except fortuitously, supply the crucial information otherwise available through a job analysis, and on which a content valid test must be based. In Vulcan, supra, 360 F. Supp at 1274-76, Judge Weinfeld held a similar test preparation procedure inadequate, and the record in this case provides no basis for a different finding here.

Yet even apart from the issue of inadequate preparation, defendants

have failed to present any convincing evidence that the challenged examinations are content valid. Indeed, about the only direct evidence of content validity put forth by defendants at trial was the testimony of Mr. Weiner, who defined content validity and testified that the tests in issue met that standard, but who gave no reasons in support of his conclusion. Tr. 372 et seq.

In contrast, plaintiffs' witness Dr. Richard S. Barrett, a nationally recognized testing expert, was able to point with specificity to serious deficiencies in the content of the examinations. It appeared to the court that Dr. Barrett's analysis was both better reasoned than Mr. Weiner's and based on a greater expertise in the science of testing. I am aware that Dr. Barrett sets a high standard for test validation;[32] nevertheless, I am convinced by his testimony, certain other evidence in the record and common sense that the challenged examinations not only have not been shown to be content valid, but are in fact lacking in content validity.

In addition to severely criticizing the method of test preparation used by defendants, Dr. Barrett stated that the actual content of the examinations had little relation to the content of the job of police officer.[33] For example, Dr. Barrett testified that the "judgment" questions on the examinations were inappropriate since:

> "there is certainly no reason to believe that a person taking this test will experience the same emotions and really relive the same experience if he were actually confronted with the situation. So what he may say he would do under these circumstances may be vastly different from what he would actually do." Tr. 871.

Yet examinations #9080, 9049 and 0013 all contained between 20-25 percent or more of such questions (involving hypothetical police situations). See Def's. exhs. N, O, P. I note that former NYCPD Commissioner Patrick Murphy also testified

that he did not believe such questions tested for the same sort of judgments that a police officer would actually have to make.[34]

Examinations #0013 and 9049 had approximately 20 percent "civic awareness" questions. Examination #9080 had approximately 8 percent of such questions. Yet Dr. Barrett testified that "certainly there is no police related behavior that stems directly from the knowledge or the lack of knowledge of that kind of question." Tr. 874. That, no doubt, is completely correct. Indeed, Dr. David Hall, defendants' witness who prepared the 1973 examination #3014, testified that civic awareness questions were not found important by his job analysis. Tr. 777-78. See Vulcan, supra, 360 F. Supp. at 1276.

Examinations #9049, 9080 and 0013 had 4 percent, 12 percent and 20 percent of their questions in the area of space and figure relations. Dr. Barrett testified that these questions had little to do with what a police officer does on his job. Tr. 876-77. Dr. Hall testified that he "would not say [these areas were] unrelated to the job, but in [Psychological Corporation's] opinion [they] did not warrant being included in the test." Tr. 781. Dr. Hall also testified that the same was true as far as "coding" questions were concerned. Ibid. Dr. Barrett again testified that such questions did not test for the content of a police officer's job. Tr. 877. Yet examination #9080 included 6 percent "coding" questions. See Def's. exh. O.

It is clear that this evidence falls short of demonstrating content validity, which is the burden defendants must meet.[35] Defendants contend, however, that they have shown indirectly what they have failed to demonstrate directly. They assert that the content of the pre-1973 examinations is substantially equivalent to the content of examination #3014,[36] and since the latter examination is content valid, the earlier examinations must be as well. Assuming arguendo the

content validity of #3014, however, defendants' argument remains unpersuasive.[37]

No doubt in part because of the significant change in test preparatio procedure,[38] the content of the later test varies substantially from that of the earlier tests. For example, the test plan for examination #3014 prepared by the Psychological Corporation in its Phase I Report suggests the following weighting in the written test:

Test Contest	Number of Items
Judgment in Police Situations	40-45
Understanding of Written Materials & Diagrams	35-40
Reading comprehension	
Completion of forms	
Diagrams	
Observational Skills	15-20
Recognition of faces	
Recall of Significant Details	
Basic Arithmetic Skills	5-10
Counting and Dial Reading	
Basic operations	
Time Problems	

Def's. exh. R. On the other hand, the test plan for examination #0013, for example, gives a totally different picture of the areas in which applicants should be tested:

Test Content	Relative Emphasis
Perception	20%
General Aptitude	40%
(Verbal 20%)	
(Arithmetic 20%)	
Social Sensitivity	20%
Awareness of Urban Problems	20%

Pl's. exh. 25.

Inspection of other of the challenged examinations and their test plans shows not only a similar difference in testing content between them and examination #3014, but also a substantial difference in testing content among themselves. See, e.g., Pl's. exhs. 27A-N, 23, 24. This evidence is insufficient under

Title VII standards. Accordingly, I find that the defendants have not demonstrated that the challenged examinations are content valid.

ii. Criteria-Related Validity

Defendants argue that they have submitted sufficient evidence to validate the challenged examinations according to the criteria-related (or "predictive") method of test validation.

Criteria-related validity studies correlate test performance with job performance. Tr. Barrett at 889; Weiner at 379; Hall at 761. When a test that is validated by a criteria-related method is employed, the examinees who achieve the highest (or lowest) scores should also be those who will be the better (or worse) employees. See APA Standard, supra, at 26 et seq.

Defendants point to a validity study prepared by Dr. William Weichun ("Weichun study"), a researcher at the New York City Board of Education. The purpose of this study was to determine the relationship between the NYCPD entry level examinations and academic success at the NYC Police Academy ("theAcademy"). Tr. 835. Dr. Weichun found that the examinations employed between 1968 and 1970 were "very good predictor[s] of success at the police academy." Tr. 83940. Dr. Weichun also found that the tests were equally predictive for whites, blacks and Hispanics. Ibid.

Plaintiffs do not contest the findings of Dr. Weichun.[39] Rather, plaintiffs contend that the study does not constitute evidence of criteria-related validity. Had Dr. Weichun's study revealed a high correlation between results on the challenged examinations and job performance, then presumably the Title VII claim would fail, as predictive validity would have been proved.[40] The correlation shown here, however, was not between test scores and job performance, but

between test scores and performance at the Academy. There was no attempt to correlate performance at the Academy and performance on the job.[41] Relying on the Supreme Court's recent decision in Washington v. Davis, 426 U.S. 229 (1976), defendants assert that such a showing is unnecessary, and that the Weichun study is sufficient under the law of that case to show job-relatedness. I disagree.

In Vulcan, supra, 490 F.2d at 396, the Second Circuit disapproved of a contention similar to that asserted here by defendants. The court stated there that without a showing that performance at training school correlated with performance on the job, demonstration of a high correlation between entry level test scores and training school performance meant little.[42] Accord, Commonwealth of Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1090 (E.D. Pa. 1972), aff'd in pertinent part, 473 F. 2d 1029 (3rd Cir. 1973); United States v. Chicago, 385 F. Supp. 543, 555-56 (N.D. Ill. 1974); Officers for Justice v. Civil Serv. Comm'n, 371 F. Supp. 1328, 1337 (N.D. Cal. 1973); Smith v. East Cleveland, 363 F. Supp. 1331, 1148-49 (N.D. Ohio 1973), aff'd in part and rev'd in part on other grounds, 520 F.2d 492 (6th Cir. 1976); Hasper v. Mayor and City council, 359 F. Supp. 1187, 1202-03 (D. Md.), modified and aff'd, 486 F.2d 1134 (4th Cir. 1973).

The reasoning of the Second Circuit in Vulcan is applicable to this case. Defendants' study demonstrates a high correlation between performance on the challenged examinations and performance at the Academy, but the task of correlating the examinations to actual performance as police officers remains unaccomplished. The respective positions of the parties would be unchanged if, for example, instead of giving these entry level examinations, the NYCPD had enrolled the same group of individuals in the Academy. Because of the established correlation, standing on completion of training at the Academy would, presumably, approximate standing achieved at the entry level examinations. That is to say, a

consistently higher proportion of whites than minorities would achieve passing grades, and a large majority of the highest achievers would be white. Accordingly, the greatest number of Academy graduates first hired would be white, and the greatest number of those first fired would be Academy graduates who are black and Hispanic. In a Title VII attack in that situation, plaintiffs' prima facie case would be established by showing as here the disproportionate impact of Academy procedures and testing on minorities. Defendants would be required to demonstrate that those testing practices are job-related as they are required here to do so in respect of the entry level examination. By introducing Academy performance as a correlate to the examinations, defendants cannot avoid their obligation to show job-relatedness.

To provide that missing ingredient defendants would have this court find job-relatedness on the basis of a high correlation between the results of two separate testing practices, neither of which by itself has been validated according to accepted methods. We cannot accept this flawed argument.

Defendants seek support for their contention in the Supreme Court decision in Washington v. Davis, supra. Reliance on Washington, however, is surely misplaced.

In Washington, two blacks whose applications to become police officers in the District of Columbia had been rejected, were permitted to intervene in a suit that challenged the promotion policies of the D.C. Police Department. They asserted that the Department's recruiting practices, which included the giving of a written test ("Test 21"), violated their rights under the due process clause of the Fifth Amendment, 42 U.S.C. § 1981 and D.C. Code § 1-320. The intervenors (respondents in the Supreme Court but referred to here as plaintiffs) moved for partial summary judgment on the recruitment phase of the case, seeking a

declaration that Test 21 unlawfully discriminated against minorities in violation of the Fifth Amendment. The defendants (petitioners in the Supreme Court) filed a counter motion for summary judgment, asserting that plaintiffs were entitled to relief on neither constitutional nor statutory grounds.

The district court granted the defendants' motion. Davis v. Washington, 348 F. Supp. 15 (D.C. 1972). The court found, inter alia: (1) there was no claim of a racially discriminatory purpose, but only a claim that Test 21 had a racially discriminatory impact; (2) a higher proportion of blacks than whites failed Test 21; (3) Test 21 had not been validated to establish its reliability for measuring job performance. Id. at 16. These findings were held sufficient to shift the burden to defendants to show the job-relatedness of Test 21. The court found that they had met that burden, as "the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither designed nor operates to discriminate against otherwise qualified blacks." Id. at 17. Most importantly, for the purposes of this case at least, the court held that the defendants were entitled to summary judgment even though Test 21 had not been validated as to subsequent job performance. It was sufficient to show validation as to performance at recruit school. Id. at 18.

On appeal, the court of appeals reversed. 512 F.2d 956 (D.C. Cir. 1975). That court held that in resolving the constitutional claim it would be guided by the Title VII principles established in Griggs v. Duke Power Co., supra, and determined that (1) it was irrelevant whether plaintiffs had shown any evidence of a racially discriminatory purpose; and (2) absent proof by defendants that Test 21 had been validated in regard to job performance, defendants had not rebutted the plaintiffs' showing of Test 21's racially discriminatory impact. 512 F.2d at 960.

The court of appeals' decision was in turn reversed by the Supreme

Court. In an opinion written by Justice White, the Court held that the court of appeals had erred in applying Title VII standards to a Fifth Amendment claim of discrimination. See discussion supra.

In part III of its opinion the Court considered the statutory issues raised by the summary judgment motion. Although Justice White does not explicitly state exactly what statutory issues the Court has in mind, and this does create some confusion, it is reasonably clear from a reading of the full opinion that the statutory holdings in Washington are limited to 42 U.S.C. § 1981 and § 1-320 of the District of Columbia Code.[43] No other interpretation makes sense. The Court explicitly states that no Title VII issue is raised by Washington, 426 U.S. at 238, n.10. See also Justice Stevens' concurring opinion, id. at 255. As far as the statutory issues were concerned, the Court held that respondents had no better claim under the statutes involved than they had under the Fifth Amendment. Justice White wrote:

> "The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands and attempting to impart a modicum of skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training school performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training performance validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge and by the current views of the Civil Service Commissioners who were parties to the case. Nor is the conclusion foreclosed by either Griggs or Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L. Ed. 2d 280 (1975); and it seems to us the much more sensible construction of the job-relatedness requirement."

426 U.S. at 250-51. The Court was not convinced that the trial court's finding that Test 21 was directly related to the requirements of the police training program was erroneous. Id. at 251-52.

Contrary to defendants' assertions, Washington does not preclude this court from determining that they have not met the burden imposed on them by Title VII of showing the job-relatedness of the examinations at issue.

First, all the Court held in part III of its opinion was that, under the proper construction of the non-Title VII statutes applicable to the case, the lower court was entitled to find Test 21 to be a valid test once it found the test directly related to the requirements of the police training program. The Court's statement that this conclusion is not "foreclosed" by either Griggs or Albemarle, is fully consistent with this interpretation, since these cases involved the stricter validation standards of Title VII. Both Justice Stevens in his concurrence, 426 U.S. at 255-56, and Justice Brennan in his dissent, id. at 257, support my reading of the case.

Furthermore, as Justice Stevens points out, the EEOC Guidelines on Employment Procedures, 29 C.F.R. § 1607, see discussion supra, are not applicable to either 42 U.S.C. §1981 or D.C. Code § 1-320, the statutes to which the Court's holding in part III was limited. These very guidelines, however, which require that a criteria-related validity study show a positive relationship between the challenged test and actual job performance, were an essential ingredient in Griggs andAlbemarle, supra. Thus Washington does not in any way preclude a court in a

purely Title VII case such as this, where the guidelines are applicable,[44] from holding that job performance validation is necessary.

Second, there is a crucial difference between Test 21 in the Washington case and the examinations challenged here. Test 21 is not used in an attempt to predict whether applicants will subsequently become good police officers. Rather, Test 21 is an examination administered generally throughout the federal service that tests an applicant's reading and verbal ability. Washington, supra, 426 U.S. at 234-35. It is used to insure that potential recruits for the police department (and indeed for other branches of the federal service) have the minimal amount of reading and verbal skills necessary for training purposes. Id. at 235; Memorandum in Support of defendants Hampton, Spain and Andolsek's motion for summary judgment, 426 U.S. Briefs 229, at 97 (1976).

This case involves a totally different type of test. The challenged NYCPD examinations are not used merely to screen out individuals whose verbal and reading proficiencies fall below those necessary for training purposes. They were clearly designed and used to predict which applicants would ultimately become the best police officers, and to eliminate from consideration those applicants who, based on the test results, would become the worst officers. In other words, they were designed to predict performance on the job, not trainability. Defendants attempt to skirt this fact by profferring evidence of the need for police officers of high intelligence. Yet, even if an applicant's score is indicative of the level of his general intelligence, that is clearly only an accidental and unplanned result of the use of the examinations. In any event, the plaintiffs in this case are all individuals who have passed the challenged examinations, and who therefore possess

the minimum abilities that defendants contend are necessary for good police work and for which they contend the examinations test. Unlike Washington, plaintiffs' complaint is based not on the use of the NYCPD examinations for initial screening purposes, but rather on their use for ranking purposes, with the result that a disproportionately large percentage of those hired last and fired first are minorities.[45]

Defendants' invocation of Washington is, therefore, unavailing. Accordingly, the court holds that the defendants have failed to demonstrate that the challenged tests are job-related under the criteria-related method of validation.

The Height Requirement

Plaintiffs' challenge to the 67 inch height requirement focuses primarily on whether defendants have complied with Title VII. They make no showing that defendants employed a height requirement with an invidiously discriminatory purpose, as is required to make out a claim under the Fourteenth Amendment, § 1981 or §1983. Washington v. Davis, supra. The use of height requirements is a well-established practice among law enforcement agencies throughout the country.[46] In a large sample of the nation's police departments, 97 percent had some minimum height requirements for male officers in 1973, with the average minimum requirement being 68 inches.[47] Indeed, in light of the traditional, accepted and widespread use of height requirements as requisites for law enforcement employment, the court would be hard-pressed to find an express discriminatory purpose in this case. Furthermore, during the examination periods under consideration, the contrary is demonstrated by the fact that the minimum height requirement for police officers was lowered from 5'8" to 5'7" with the hope that this would increase the number of Hispanics on the force.

Nor is the NYCPD's voluntary suspension of the height requirement 1973 indicative of earlier discriminatory intent. In March, 1973, the Justice Department for the first time required police departments receiving federal funds to comply with EEOC Guidelines on employment selection procedures[48] and to demonstrate that minimum height requirements were an operative necessity for designated job categories. Because the defendant department concluded that it should conduct its own study[49] to show the correlation between height and job performance rather than rely on other studies and opinions, it eliminated the height requirement prospectively for the 1973 examination. In point of fact, the department's elimination of the height requirement in 1973 in order to conduct its own study may be more probative of good faith than of discriminatory intent.

However, with respect to the Title VII claim, plaintiffs have introduced evidence tending to show that most Hispanics could not meet the height requirement imposed by the NYCPD and that therefore, the requirement had a disproportionate impact on Hispanics.[50] Defendants have not met the burden of justification which under Title VII is required.

The pervasive use of height standards observed earlier bespeaks a widespread belief among law enforcers that the height of a police officer has an important effect on his job performance. These views, however, have recently come under attack and their validity has been seriously questioned. The fact that the use of height requirements are a time-honored or widely-accepted practice does not automatically save it from a claim of discrimination. As has been seen in the areas of race and sex discrimination, long-accepted stereotypes too often help perpetuate discriminatory practices even though they have no basis in fact. The federal government has demonstrated its concern that height requirements

not be improperly used to exclude minority groups from employment as law enforcement personnel. EEOC Guidelines, 29 C.F.R. § 1606.1(b)[51] In order to defend a minimun height standard successfully, defendants have to show that it was actually job-related. This they have failed to do.

As conceded by defendants, an analysis of recent studies of height requirements conducted by the NYCPD revealed "major methodological weaknesses or insufficient data" which made the findings of these studies at best inconclusive. Def's. exh. E. See also testimony of Ingrid Balady, Tr. 212. One study referred to in defendants' post-trial memorandum concluded that height differences in two departments surveyed (Nassau County, New York and Dallas, Texas) have, with one exception, had no statistically significant effect upon performance.[52] Its findings were most persuasive.

Federal courts in other Title VII race and sex discrimination cases have found that height was not a valid occupational qualification. See Mieth v. Dothard, 12 E.P.D. ¶11,040 (M.D. Ala. 1976); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1975); Officers for Justice v. Civil Serv. Comm'n, 395 F. Supp. 378 (N.D. Cal. 1975); Hail v. White, 8 E.P.D. ¶ 9637 (N.D. Cal. 1973); but see Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975).[53] We have been given no rational basis for validating such a requirement here. In sum, defendants have not satisfied Title VII yardsticks in respect of a 67 inch minimum height requirement; accordingly, they are held to have violated Title VII.

Plaintiffs' motions for certification of a plaintiff class and for a preliminary injunction with respect to both the entry level examinations and the height requirement are granted. The foregoing shall constitute the court's findings

of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

IT IS SO ORDERED.

DATED: New York, New York

March 17, 1977

U. S. D. J.

Opinion of Carter, J. #45702

THE GUARDIANS ASSOCIATION OF THE N.Y.C.P.D. v. CIVIL SERV. COMM'N.
76 Civ. 1982

NOTES

1. 42 U.S.C. § 2000e-5(1) provides that if complainants wish to bring suit on the basis of the alleged discriminatory acts described in their charges filed with the Equal Employment Opportunity Commission (EEOC), they must do so within 90 days of receiving the EEOC's "notice of right to sue" letter. There is no question that plaintiffs have complied with this provision. The Hispanic Society filed charges with the EEOC on and received its "right to sue" letter on April 16, 1976. The Guardians Association received a separate right to sue letter on August 4, 1976. Suit was filed by these plaintiffs on April 30, 1976. With respect to the Hispanic Society, the instant action was filed well within 90 days of receiving its "right to sue" letter. As for the Guardians Asociation, it is properly before the court for two reasons. First, the issuance of a "suit" letter by the EEOC validates a pending action brought by a complainant. Henderson v. Eastern Freight Ways, Inc., 460 F. 2d 258, 260 (4th Cir. 1972), cert. denied, 410 U.S. 912 (1973). Second, plaintiffs in a certified class action, see infra, are properly before the court even where they commenced their action prior to receiving their notices, as long as one plaintiff initiating the suit has a "right to sue" letter. Leisner v. New York Tel. Co., 358 F. Supp. 359, 362 n.1 (S.D.N.Y. 1973) (Motley, J.).

2. Plaintiffs also allege that defendants' practices violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the Revenue Sharing Act of 1972, 31 U.S.C. § 1221 et seq.; and Article 5, Section 6 of the New York Constitution. In view of the court's determination of the constitutional and Title VII claims, the merits of these other claims need not be reached.

3. It appears that both plaintiffs and defendants have fully presented their case and that a permanent injunction might be granted at this time. However, since there is some possibility that all proof has not been profferred, both parties will be given an opportunity to present further evidence at a plenary trial should they desire. If neither party wishes to take advantage of this opportunity a permanent injunction shall be granted. Nevertheless, a hearing will be necessary to determine the relief that is warranted for the various members of the class.

4. In this opinion, the term "minorities" shall mean blacks and Hispanics.

5. Rule 23, Fed. R. Civ. P., provides, in pertinent part:

> (a) prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the

representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a Class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of th claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

6. Certification would also be appropriate in this case under subdivision (b)(3) of Rule 23. Since both sections are available it is preferable to certify the class under (b)(2) since the availability of the right to opt out in a (b)(3) class action would unnecessarily complicate matters where injunctive relief is called for.

Moreover, a (b)(3) class suit would present notice problems by calling into play the prtection that subsection (c)(2) provides to (b)(3) class members. It would require "individual notice to members who can be identified through reasonable effort." See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).

7. An applicant's score is adjusted upward five points if he is a military veteran, and an additional five points if he is a disabled veteran. Plaintiffs make no claim that such adjustments have a racially discriminatory impact.

8. Title VII was not applicable in this case. See id. at 238, n.10.

9. Title 42 U.S.C. §1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...."

10. Title 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or communities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

11. Plaintiffs have sued, inter alia, the Civil Service Commission of the City of New York, the Department of Personnel of the City of New York, and the New York City Police Department. In light of the Second Circuit's recent opinion in Monell v. Department of Soc. Serv. of the City of New York, 532 F.2d 259 (2d Cir. 1976), there is some doubt as to whether any or all of these defendants can be liable under § 1981 or §1983. The court in Monell wrote:

"[i]t is common ground that a municipality is not itself a 'person' under the Civil Rights Act, Monroe v. Pope, [365 U.S. 167 (1961)] at 187-92. ... City of Kenosha v. Bruno, [412 U.S. 507 (1973)] and that a state or county is also not such a 'person' ... By like token, a department of such government is not a 'person.' ...
(citations omitted)

Id. at 262-63. Melani v. Board of Education of the City of New York, 12 E.P.D. ¶ 11,068 (S.D.N.Y. 1976) (Gagliardi, J.). See also International Soc. for Krishna Consciousness, Inc. v. New York Port Authority, ___F. Supp.___, Civ. No. 75-5388 (S.D.N.Y., Jan. 14, 1977) (Carter, J.).

12. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) now reads as follows:

"(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...."

13. Although plaintiffs do not challenge the 1973 examination, they do not concede its validity. As the discussion infra will show, the 1973 examination is substantially different than those used earlier, and while the court makes no determination as to the validity of the 1973 examination, there seems little

question that the later examination is measurably superior to those previously used.

14. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, was amended in March, 1972 to include municipalities as "employers" under the Act.

15. The filing of a timely charge with the EEOC has been held a jurisdictional prerequisite to a private action under Title VII. McDonell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

16. The threatened furloughs were the 1975 layoffs involved in this case, which resulted from the city's cut of the Police Department's budget.

17. The layoffs in Acha, as here, were made pursuant to § 80 of the New York Civil Service Law, which plaintiffs concede is a facially neutral non-discriminatory seniority system.

18. Judge Metzner found that effective January, 1972, the maternity leave policy had been changed.

19. Plaintiffs have moved for a preliminary injunction. In order to secure a preliminary injunction, a party must show "(1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping directly toward the party requesting the preliminary relief." Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973), and cognate cases. While I have not expressly dealt with these prerequisites in the text, it should be quite clear that the decision to grant the preliminary injunction is based on the conclusion that relief is warranted under either test.

20. See Pl's exh. 1, Rand Report at 14, for the definitions used by Rand of the various racial groups.

21. See Pl's. exh. 14, letter from Norman Redlich, New York City Corporation Counsel, to Allan Luks of the Rand Institute. Note that defendants expressly stated in this letter that neither the methodology nor the finding of the report would necessarily represent the views of the city. Id. at ¶ 6. All parties were, however, kept informed at all times of the methodology that was being used by Rand.

22. See Rand Report, Pl's. exh. 1 at 15-24 for a detailed explanation of the methodology used.

23. The first method used data from the NYCPD, the questionnaire and the telephone data; the second used data from the census; the third used data involving Hispanic surnames. Rand Report at 25-26.

24. The first method used data from the NYCPD, the questionnaire and the telephone data;the second used NYCPD and questionnaire data, correcting for differential response rates; and the third used census data. Rand Report at 27-46.

25. See appendix for some of the statistical findings of the Rand Study.

26. See Pl's. Post-Hearing Memorandum, at 20-24.

27. Statistical evidence alone is sufficient to establish a prima facie case of discrimination. See United States v. Wood, Wire and Metal Lathers' Union, Local 46, 471 F.2d 408, 414 n.11 (2d Cir.), cert. denied, 412 U.S. 939 (1973); Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354, 1358 (9th Cir. 1975); Rodriguez v. East Texas Motor Freight Co., 505 F.2d 40, 53 (5th Cir. 1974); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 307 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973).

28. The parties' dispute over the proper applicant pool might, on the other hand, be relevant if the plaintiffs claimed that defendants' recruitment practices were discriminatory. Furthermore, to the extent that these practices are claimed relevant to the issue of discriminatory purpose involved in the constitutional claims — the dispute as to the proper applicant pool is relevant. As the discussion, supra, indicates, however, plaintiffs have not met their burden of showing discriminatory purpose in respect of the reach of constitutional strictures.

29. See footnote 21, supra.

30. See EEOC Guidelines on Employment Testing Procedures ("EEOC Guidelines"), 29 C.F.R. § 1607.5, which states:

> "§ 1607.5 Minimum standards validation.
>
> (a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related valdity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street N.W., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication may also be appropriate where criterion-related validity is not feasible. ..."

The Supreme Court has held in both Griggs, supra, and Albemarle, supra, that the EEOC Guidelines express the will of Congress in passing Title VII, and are entitled to great deference. See Jones v. New York City Human Resources Administration, 391 F. Supp. 1064, 1075-76 and cases cited therein (S.D.N.Y. 1975).

31. The actual procedure described by Weiner involved submission of drafts, review and correction of those drafts, and at times referral to "higher authorities" for resolution of disputes that might arise. Tr. 337 et seq. Parenthetically, it is important to note that as Weiner describes this preparation, it appears beyond doubt that defendants prepared the examinations with the goal of predicting which applicants would make the best police officers, and not, as defendants now assert — surely in order to

draw the closest possible parallel to Washington v. Davis, supra — to predict which applicants would do best at the Academy.

32. Dr. Barrett testified that he had appeared as an expert in 54 or 55 other cases, and in only two instances had testified that the examination in question was valid. Tr. 938-39.

33. Dr. Barrett based his testimony on Psychological Corporation's job analysis used to prepare examination #3014, which defendants assert is valid.

34. On the other hand, Dr. Hall, defendants' expert, testified that his job analysis for the 1973 examination indicated that judgment questions should constitute 40 percent of the entry level test. Tr. 787. Even if Dr. Hall is correct, and it appears to me that Dr. Barrett and Commissioner Murphy have the stronger position , it is nevertheless the case that the challenged examinations weighted the importance of judgment questions incorrectly, and by a substantial amount.

35. In their memorandum, at 120, defendants argue in part that plaintiffs have not demonstrated that the NYCPD examinations are unrelated to the position of police officer. Plaintiffs need not make such a demonstration, however. The burden rests on the defendants to show that the examinations are job-related.

36. Examination #3014 was given in 1973. Plaintiffs do not challenge its legality in this action. On the other hand, neither do they concede its validity.

37. The court makes no finding as to whether examination #3014 is or is not content valid. Dr. Hall, who prepared the examination, testified that it is content valid. Dr. Barrett testified at first that the examination was not content valid, but on cross-examination modified his testimony and stated that he could not be certain whether #3014 is or is not content valid.

38. The most important difference is that Psychological Corporation, after making a six month study of the job of police officer, prepared a job analysis. See Dr. Hall's testimony for a full description of the test preparation used in respect of examination #3014. Tr. 734 et seq.

39. Plaintiffs do, however, assert that the study was hastily done to draw a parallel to Washington v. Davis, 426 U.S. 229 (1976), discussed infra.

40. I say "presumably", since plaintiffs would probably challenge Dr. Weichun's methodology if the result were as hypothesized in the text. The court assumes for the purposes of this case, however, that his methodology was sound.

41. Indeed, former Commissioner Murphy testified that he did not believe there was a strong correlation between performance at the Academy and performance on the job. Tr. 1100-01. Even Captain Lawlor, who disagreed in general with this statement, stated that job performance was sometimes a problem for candidates who did well on academy examinations, but who related poorly to the communities in which they worked. Tr. 720-21.

42. In footnote 11 of its opinion, the court stated:

> The danger of distortion in this regard is particularly acute, since performance in the probationary school is also evaluated by means of a written examination. Thus, there is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job-related, such a demonstration is barren indeed." 490 F.2d at 396.

43. Both 42 U.S.C. § 1981 and D.C. Code § 1-320 were raised in respondents' amended complaint as bases for a finding of a violation of their rights. 426 U.S. at 233. As the Court notes, id., at n.2, 5 U.S.C. § 3304(a) —which provides certain rules concerning the giving of competitive examinations for testing applicants for appointment in the competitive service — is also relevant to the statutory issues in Washington, since it is made expressly applicable to the District of Columbia police force by D.C. Code § 4-103.

44. As support for its conclusion that training program validation was sufficient in Washington, the Court at 426 U.S. at 250, n.16, set out the pertinent part of the current instructions of the Civil Service Commission on "Examining, Testing, Standards and Employment Practices." These instructions state that "an appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as: (a) Effective job performance; (b) Capability; (c) Success in training; (d) Reduced turnover; or (e) Job satisfaction." Immediately thereafter, the Court stated: "see also Equal Employment Opportunity Commission Guidelines .... 29 C.F.R. § 1607.5(b)(3) ..." Id. at 251. The Court's reference to the EEOC Guidelines using the introductory signal "see also" (as defined in A Uniform System of Citation, p.7 (12th Ed. 1976), "see also" means: "cited authority provides background to a question analogous to that examined in text, which can profitably be compared with it."), should not, presumably, be taken to imply that the Guidelines provide for the same standards of test validation as the quoted Civil Service instructions. Indeed, in stating that "criteria of employee adequacy" may include "measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure," the Guidelines also state that "[w]hatever criteria are used they must represent major or critical work behaviors as revealed by careful job analysis." 29 C.F.R. § 1607.5(b)(3).

45. In the recent layoffs, 9.8% of the white police officers were laid-off. In sharp contrast, 13% of the black officers were laid-off, and 22% of the Hispanic officers were laid-off. See Pl's. exhs. 12, 13.

46. Some commonly advanced arguments in support of minimum height standards are: (1) strength is related to height, C. Morgan, ed., Human Engineering Guide to Equipment Design, at 557 (1963) as cited in R. Hoobler & J.

McQueeney, "A Question of Height," Police Chief, Nov., 1973 at 48; (2) taller officers have a psychological advantage see Smith v. Troyan, 520 F.2d 492, 496 (6th Cir. 1975); (3) the visibility of taller officers is an asset in crowd control, F. Verducci, "Height and Weight Requirements for Police Officers," submitted to the Civil Serv. Comm'n, City and County of San Francisco; (4) many adult males find small body size a threat to self-esteem and tend to depreciate their own personal worth as a result of this perception, E. Gunderson, "Body Size, Self-Evaluation and Military Effectiveness," 2 J. of Personality and Soc. Psych., No. 6 at 902_906 as cited in R. Hoobler & J. McQueeney, id. at 48; and (5) shorter officers are more likely to be assaulted, id. at 46, 48. See also, T. White & P. Bloch, Police Officer Height and Selected Aspects of Performance, Police Foundation, et al., at 2 (1975).

47. T. Eisenberg, D. Kent & C. Wall, Police Personnel Practices in State and Local Governments, Int'l Ass'n of Chiefs of Police, et al. (1973).

48. 29 C.F.R. § 1607.1-.14.

49. The validation study was never completed because the layoffs in 1975 eliminated the pool of shorter officers needed for comparison with officers meeting the height requirement.

50. For this assertion, plaintiffs rely on "Height of American Male Youths of Military Age by Race, Ethnic Group and Selected Geographic Areas, Fiscal Year 1972," prepared for the Office of the Ass't Sec'y of Defense. This report classified people as "Spanish" solely on the basis of their surnames. Id. at 1, 3. The age range in this study was 17 through 26 years of age. This is roughly comparable to the age range of NYCPD applicants, i.e., 21 through 29. It was found that a required standard height of 67 inches (NYCPD's height requirement during the period under consideration) would eliminate 54.5 percent of the Spanish youths in New York and New Jersey as compared with only 19.1 percent for whites and 22.1 percent for blacks. Id. at 2 (Table 4 and the accompanying graph, on which these figures are purportedly based, seem to indicate that the impact on Hispanics is even more disproportionate).

51. In Griggs v. Duke Power Co., supra, the Supreme Court noted that the EEOC's Guidelines interpreting the Act according to the mandate of 42 U.S.C. § 2000e-12(a) were "entitled to great deference." Id. at 433-34.

52. T. White & P. Bloch, Police Officer Height and Selected Aspects of Performance, Police Foundation, et al. at 6 (1975).

53. While the court in Smith v. Troyan held that the district court "erred in finding no 'rational support' for the height requirement," 520 F.2d at 496, the case is distinguishable. The decision in Smith was based on a record where the testimony of three police officers in support of the need for a height requirement went uncontradicted. Moreover, the court felt it significant to note that no Title VII claim was asserted; nor was the court faced with a racial challenge to the height requirement.

APPENDIX

A careful reading of the Rand Report, Pl's. exh. 1, will make clear the disproportionate racial impact of the challenged examinations. The following tables — lifted directly from the Report — are provided here for the convenience of those who do not have ready access to the record in this case.

Table 4

EXAM 0013

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	574	12.8	34	3.5	19	2.3	627	10.0
2	92-94	548	12.2	44	4.6	34	4.2	626	10.0
3	89-92	514	11.5	54	5.6	59	7.2	627	10.0
4	87-89	535	11.9	67	6.9	24	2.9	626	10.0
5	84-87	484	10.8	74	7.7	69	8.4	627	10.0
6	80-84	473	10.6	101	10.4	52	6.4	626	10.0
7	76-80	426	9.5	126	13.0	75	9.2	627	10.0
8	70-76	376	8.4	131	13.5	119	14.5	626	10.0
9	61-70	335	7.5	130	13.4	162	19.8	627	10.0
10	0-61	216	4.8	206	21.3	205	25.1	627	10.0
Pass	75-100	3670	81.9	527	54.5	372	45.5	4569	72.9
Fail	0-74	811	18.1	440	45.5	446	54.5	1697	27.1
Total		4481	100.0	967	100.0	818	100.0	6266	100.0
Average score		84.9		75.3		73.0		81.8	

NOTE: Counts and percents are subject to sampling errors as shown in Table 5.

Table 5

EXAM 0013

95% CONFIDENCE INTERVALS FOR ESTIMATES
OF EXAM SCORE DISTRIBUTION

Decile	Whites		Blacks		Hispanics	
	Number	Percent	Number	Percent	Number	Percent
1	552- 590	12.0-13.5	18- 56	1.7- 6.3	19- 54	2.1- 7.3
2	522- 573	11.4-13.1	27- 65	2.6- 7.4	23- 52	2.6- 7.0
3	480- 549	10.5-12.6	33- 78	3.1- 8.9	32- 87	3.6-11.7
4	507- 564	11.1-12.9	37- 96	3.5-10.9	24- 56	2.7- 7.5
5	457- 511	10.0-11.7	53- 94	5.0-10.7	50- 90	5.6-12.1
6	442- 504	9.6-11.5	73-129	6.9-14.7	41- 68	4.6- 9.2
7	394- 457	8.6-10.4	98- 155	9.3-17.7	60- 94	6.7-12.7
8	333- 418	7.3- 9.6	97- 166	9.2-18.9	84-153	9.4-20.6
9	290- 373	6.3- 8.5	98- 162	9.3-18.5	126-199	14.1-26.8
10	174- 300	3.8- 6.8	167- 244	15.8-27.8	136-274	15.2-36.9
Pass	3580-3760	78.1-86.0	447- 607	42.4-69.2	316-428	35.3-57.7
Total	4372-4586	100.0	877-1054	100.0	742-896	100.0

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Table 6

EXAM 8046

ESTIMATED RACIAL COMPOSITION OF DECILES
DATA FROM PD, QUESTIONNAIRE, TELEPHONE SAMPLE

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	365	12.8	26	3.3	14	3.5	405	10.0
2	90-96	358	12.5	40	5.0	8	2.0	406	10.0
3	86-90	343	12.0	42	5.3	20	5.1	405	10.0
4	82-86	340	11.9	54	6.8	12	3.0	406	10.0
5	78-82	305	10.7	69	8.6	31	7.8	405	10.0
6	73-78	296	10.3	65	8.1	45	11.4	406	10.0
7	69-73	270	9.4	102	12.8	33	8.4	405	10.0
8	63-69	222	7.8	126	15.8	58	14.7	406	10.0
9	56-63	251	8.8	104	13.0	50	12.7	405	10.0
10	29-56	112	3.9	170	21.3	124	31.4	406	10.0
Pass	75+	1932	67.5	280	35.1	119	30.1	2333	57.5
Fail	< 75	930	32.5	518	64.9	276	69.9	1722	42.5
Total		2862	100.0	798	100.0	395	100.0	4055	100.0
Average score		80.0		68.9		65.9		76.4	

NOTE: Counts and percents are subject to sampling errors as shown in Table 7.

Opinion of Carter, J. #45702

Table 7

EXAM 8046

95% CONFIDENCE INTERVALS FOR
EXAM SCORE DISTRIBUTION

Decile	Whites		Blacks		Hispanics	
	Number	Percent	Number	Percent	Number	Percent
1	344- 383	11.7-13.8	14- 44	1.6- 6.1	8- 28	1.8- 8.2
2	333- 378	11.3-13.6	19- 64	2.2- 8.8	8- 35	1.8-10.2
3	321- 367	10.9-13.2	24- 63	2.8- 8.7	14- 33	3.1- 9.6
4	322- 355	10.9-12.8	38- 71	4.2- 9.8	11- 38	2.5-11.1
5	287- 327	9.8-11.7	51- 86	5.8-11.9	23- 42	5.1-12.3
6	268- 321	9.1-11.5	45- 86	5.2-11.9	25- 65	5.6-19.0
7	241- 300	8.2-10.8	75-130	8.6-18.0	20- 48	4.5-14.0
8	189- 253	6.4- 9.1	96-155	11.0-21.4	36- 81	8.1-23.7
9	220- 282	7.5-10.1	76-132	8.7-18.2	30- 70	6.7-20.5
10	[illegible]- 139	2.9- 5.0	140-200	16.1-27.6	94-153	21.0-44.7
Pass	1886-1978	64.1-71.1	237-322	27.2-44.5	88-150	19.7-43.9
Total	2783-2942	100.0	724-872	100.0	342-447	100.0

Table 8

EXAM 8046

ESTIMATED EXAM SCORE DISTRIBUTIONS BY RACE
DATA FROM PD AND QUESTIONNAIRES ONLY

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	96-100	358	12.9	17	2.3	30	5.4	405	10.0
2	90-96	359	12.9	19	2.6	28	5.1	406	10.0
3	86-90	355	12.8	25	3.5	25	4.5	405	10.0
4	82-86	334	12.0	49	6.8	23	4.1	406	10.0
5	78-82	282	10.2	97	13.3	26	4.7	405	10.0
6	73-78	295	10.6	66	9.1	45	8.1	406	10.0
7	69-73	197	7.1	107	14.8	101	18.2	405	10.0
8	63-69	196	7.1	115	15.9	95	17.1	406	10.0
9	56-63	227	8.2	81	11.2	97	17.5	405	10.0
10	29-56	171	6.2	149	20.6	86	15.5	406	10.0
Pass	75+	1910	68.9	257	35.4	166	29.9	2333	57.5
Fail	< 75	864	31.1	468	64.6	390	70.1	1722	42.5
Total		2774	100.0	725	100.0	556	100.0	4055	100.0

Assumption used in deriving table:

The rate of response to the questionnaire by blacks was 91 percent higher than for whites, and the response rate for Hispanics was 11 percent higher than for whites.

Table 9

EXAM 8C46

HISPANIC COUNT BY SURNAME CHECK

Decile	Score	Count	Percent of Total Hispanics	Percent of Subjects in Score Range
1	96-100	10	2.7	2.4
2	90-96	11	3.0	2.7
3	86-90	25	6.8	6.2
4	82-86	16	4.4	3.9
5	78-82	32	8.8	7.9
6	73-78	30	8.2	7.4
7	69-73	45	12.3	11.1
8	63-69	58	15.9	14.3
9	56-63	61	16.7	15.1
10	29-56	77	21.1	19.0
Pass	75+	115	31.5	4.9
Fail	< 75	250	68.5	14.5
Total		365	100.0	9.0

Table 10

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM POLICE DEPARTMENT AND QUESTIONNAIRES ONLY
(EXCEPT SURNAME MATCH USED FOR HISPANICS)

Decile	Score	White		Black		Hispanic		Total	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent
1	94-100	573	12.7	29	2.9	25	3.3	627	10.0
2	92-94	546	12.1	40	4.0	40	5.3	626	10.0
3	89-92	532	11.8	55	5.5	40	5.3	627	10.0
4	87-89	552	12.2	42	4.2	32	4.2	626	10.0
5	84-87	486	10.8	80	8.0	61	8.1	627	10.0
6	80-84	473	10.5	93	9.3	60	8.0	626	10.0
7	76-80	442	9.8	104	10.4	81	10.8	627	10.0
8	70-76	386	8.6	138	13.8	102	13.5	626	10.0
9	61-70	319	7.1	179	17.9	129	17.1	627	10.0
10	0-61	202	4.5	242	24.2	183	24.3	627	10.0
Pass	75+	3712	82.3	482	48.1	375	49.8	4569	72.9
Fail	< 75	799	17.7	520	51.9	378	50.2	1697	27.1
Total		4511	100.0	1002	100.0	753	100.0	6266	100.0

Assumption used in deriving table:

Response rate by blacks to questionnaire was 51 percent higher than for whites.

Table 11

EXAM 0013

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)
FOUR BOROUGHS COMBINED

Decile	Excluding Hispanic Surname		Including All Subjects		
	White	Black	White	Black	Hispanic
1	13.8 ± 1.3	2.3 ± 1.5	14.4 ± 1.4	2.7 ± 1.8	1.7 ± 2.5
2	11.7 ± 1.2	3.8 ± 1.7	12.3 ± 1.3	3.5 ± 1.9	3.8 ± 2.8
3	12.1 ± 1.2	4.3 ± 1.7	12.3 ± 1.3	5.7 ± 2.2	3.2 ± 2.8
4	12.4 ± 1.2	3.4 ± 1.6	12.0 ± 1.3	2.[illegible] ± 1.8	7.2 ± 3.1
5	11.2 ± 1.2	7.0 ± 2.0	11.6 ± 1.3	8.[illegible] 2.6	5.3 ± 3.1
6	10.5 ± 1.2	7.5 ± 2.1	10.7 ± 1.2	8.7 ± 2.6	6.0 ± 3.2
7	9.5 ± 1.1	12.8 ± 2.5	9.1 ± 1.2	10.2 ± 2.9	14.4 ± 4.0
8	8.0 ± 1.0	16.1 ± 2.8	7.8 ± 1.1	14.3 ± 3.3	17.0 ± 4.3
9	6.1 ± 0.9	21.1 ± 3.0	5.9 ± 1.0	22.1 ± 3.7	15.9 ± 4.4
10	4.7 ± 0.8	21.6 ± 3.0	4.1 ± 0.9	22.2 ± 3.8	25.6 ± 4.8
Pass	83.4 ± 1.4	45.7 ± 3.8	84.5 ± 1.6	45.5 ± 4.7	46.2 ± 5.9
Fail	16.6 ± 1.4	54.3 ± 3.8	15.5 ± 1.6	54.5 ± 4.7	53.8 ± 5.9

NOTE: Numbers after ± give 95% confidence intervals. Portions of range lying below zero may be ignored.

Table 12

EXAM 8046

ESTIMATED EXAM SCORE DISTRIBUTIONS
DATA FROM CENSUS TRACT CHARACTERISTICS
(Percent of racial group in each decile)
FOUR BOROUGHS COMBINED

Decile	Excluding Hispanic Surname		Including All Subjects		
	White	Black	White	Black	Hispanic
1	12.5 ± 1.5	3.6 ± 1.8	12.6 ± 1.6	2.8 ± 2.1	5.6 ± 3.8
2	12.2 ± 1.5	4.2 ± 1.8	12.1 ± 1.6	3.6 ± 2.2	6.8 ± 4.1
3	12.0 ± 1.5	4.4 ± 1.9	11.3 ± 1.6	3.6 ± 2.3	10.8 ± 4.3
4	11.9 ± 1.5	7.6 ± 2.2	12.6 ± 1.6	8.2 ± 2.7	3.5 ± 3.8
5	10.0 ± 1.4	10.1 ± 2.4	10.0 ± 1.5	12.3 ± 3.0	6.5 ± 4.2
6	9.7 ± 1.3	10.5 ± 2.4	9.2 ± 1.7	11.1 ± 3.4	11.1 ± 4.8
7	10.0 ± 1.5	7.7 ± 2.6	10.5 ± 1.8	6.9 ± 3.4	9.5 ± 5.0
8	8.4 ± 1.4	14.7 ± 3.2	9.1 ± 1.7	15.8 ± 4.8	10.9 ± 5.5
9	8.2 ± 1.4	13.7 ± 3.1	8.5 ± 1.6	13.0 ± 4.4	13.7 ± 5.9
10	4.9 ± 1.1	23.5 ± 3.7	4.2 ± 1.2	23.0 ± 5.8	21.1 ± 7.1
Pass	65.9 ± 2.8	37.8 ± 4.4	65.1 ± 3.5	38.0 ± 10.2	43.3 ± 12.1
Fail	34.1 ± 2.8	62.2 ± 4.4	34.9 ± 3.5	62.0 ± 10.2	56.7 ± 12.1

NOTE: Numbers after ± give 95% confidence intervals. Portions of ranges lying below zero may be ignored.

Affidavit of James M. Taylor Read In
Support of Defendant's Proposed Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

THE GUARDIANS ASSOCIATION,
et al.,

Plaintiffs, 76 Civ. 1982 (RLC)

-against- AFFIDAVIT

CIVIL SERVICE COMMISSION OF THE
CITY OF NEW YORK, et al.,

Defendants.
----------x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JAMES M. TAYLOR, being duly sworn, deposes and says:

1. I am the First Deputy Commissioner of the New York City Police Department and having knowledge of the facts as set forth hereinafter submit this affidavit in support of defendants' proposed order. The affidavit is not submitted by the Commissioner, Michael J. Codd, because he is attending a conference in California in his official capacity. In his absence, I am the Acting Police Commissioner.

2. The defendants' proposed order conforms with the position taken by defendants throughout the course of this litigation with respect to hirings during 1976 and 1977. That position is that all persons employed by the New York City Police Department from the preferred list will be informed that their right to employment is subject to the rights, if any, as determined in this litigation.

Affidavit of James M. Taylor Read In
Support of Defendant's Proposed Order

3. Counsel advised me that plaintiffs' proposed order would require the Police Department to re-order the preferred list to reflect adjusted seniority dates/equivalent to the median appointment date of several prior examinations for police officer before the hiring scheduled for March 31, 1977 may proceed. For the reasons outlined herein the Police Department urges the Court to adopt the interim solution provided in defendants' proposed order.

4. The Police Department cooperating with the Mayor to avoid municipal bankruptcy imposed a hiring freeze on the Department and additionally terminated 2864 police officers on June 30, 1975. These officers were laid-off on a statutory last-hired first-fired schedule and are eligible for re-hire on a preferred basis in order of appearance on a list determined by date of hire. (Preferred List).

5. Commencing on March 31, 1976, a one year grant from the Department of Labor enabled the Department to re-hire 205 of these laid-off officers, in a provisional status. Additionally, the availability of Law Enforcement Assistance Administration funds permitted the Department to re-hire 60 more laid-off officer, provisionally, for a one year period as of August 13, 1976. A third group of 250 officers was re-hired through a Comprehensive Education and Training Act (CETA) for a four month period beginning March 18, 1977.

6. I am advised that the plaintiffs' herein sought to stay the hirings of August, 1976 and of March 18, 1977 but that the Court denied that application upon the submission of an affidavit of Police Commissioner Codd that all such hirings would be provisional and subject to the rights of plaintiffs' adjudicated here.

Affidavit of James M. Taylor Read In
Support of Defendant's Proposed Order

7. Due to the accumulation of vacancies in excess of 1500 per year in the Department, tax-revenue funds will be available for the first time since the freeze to re-hire 233 police officers on permanent lines. The availability of this funding coincides with the expiration of the Department of Labor grant and eliminates the necessity of terminating the 205 officers rehired in March, 1976.

8. It is the Department's position that these officers should be required to acknowledge that their employment is subject to the rights established here, if any, as have prior hires.

9. Of all persons hired* from the preferred list since the freeze, including 59 to the Department of Corrections and excluding 57 re-hired after adjudication and upon Court order in the Acha case, 26% are minority. Any recomputation of the relative seniority of the 617 minority persons on the preferred list would also necessitate a recomputation of the relative seniority of the 26% minority hires. Such recomputation involves not only investigation of prior examinations taken by the plaintiffs now on the preferred list but also a review of their qualifications as of the earlier examination to determine satisfaction of eligibility requirements. Such a process is not capable of completion by March 31, 1977. Moreover, it relies upon the conclusion that the median appointment date is the appropriate relief in this case. That issue of relief was, I am informed, specifically postponed by the Court to post-trial hearings or briefings. It is, in this vein, not insignificant to note that the Department has experienced tremendous fluctuation in manpower, in hires and re-hires which necessarily has a detrimental impact upon police officer morale. The plaintiffs' proposed order would

* including the hirings of March 31, 1977

serve to exacerbate that problem and additionally disrupt the operations of the Department without the assurance that the re-adjusted seniority would be permanent or correct.

10. I expect that further federal funding sources will soon become available to the Police Department for rehiring additional police personnel. Such opportunities for hiring must be utilized.To forego them for any reason whatever at this point would be unconscionable.

11. The detriment involved in plaintiffs' proposed order is not limited to the Police Department. Two other city departments will be prevented from meeting critical personnel needs if the preferred list is not available to them for hiring. In this regard, I have been informed that both the Department of Corrections and the Fire Department intend to utilize the preferred list for hiring in the near future.

12. Should the members of the plaintiffs' class ultimately establish entitlement to relief,adjustments in the preferred list can be made at that time. In the interim the rights of the plaintiffs as well as the rights of all persons on the preferred list are safeguarded by virtue of the acknowledgement required for re-hirings.

13. In conclusion, because minority individuals constitute a significant percentage of persons re-hired by the Police Department, because the propriety of the relief suggested by the plaintiffs has not been adjudicated, because the re-ordering of the preferred list as suggested by the plaintiffs would disrupt unnecessarily the Police

Affidavit of James M. Taylor Read In
Support of Defendant's Proposed Order

Department as well as the lives of police officers and laid off police officers, it is respectfully requested that the Court adopt the proposal submitted by defendant.

James Taylor

Sworn to before me this
23rd day of March, 1977.

Paul L. Brennan

PAUL L. BRENNAN
Notary Public, State of New York
No. 52-0406480
Qualified in Suffolk County
Commission Expires March 30, 1977

Affidavit of Sara E. Steinbock Read In Support of Plaintiff's Proposed Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION, et al., Plaintiffs,	:	76 Civ. 1982 (RLC)
-against-	:	AFFIDAVIT
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al., Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SARA E. STEINBOCK, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and am one of the attorneys representing plaintiffs in this action. I submit this affidavit in support of plaintiffs' proposed order.

2. At a hearing on March 23, 1977 this Court ordered the parties to jointly endeavor to gather the data necessary to provide relief to members of the plaintiff class. At that hearing, defendants contended that such data could not be developed before the hirings scheduled for March 31, 1977 and April 1, 1977. It was plaintiff's position that this information could be gathered and indeed must be gathered immediately to effectuate this Court's opinion of March 17, 1977.

3. At the close of the hearing on March 23, defendants agreed to provide personnel to work with

plaintiffs in calling Department of Personnel files to accumulate the information necessary to develop constructive seniority dates for the members of the plaintiff class. Although defendants promised at least two people to assist plaintiffs, no one was in fact provided. The data was gathered completely by plaintiffs, with no direct assistance from defendant personnel.

4. In order to gather the data presented here, plaintiffs' counsel and staff, together with counsel and staff for plaintiffs in Acha v. Beame, worked literally night and day beginning on the afternoon of March 23. The raw data which supports the attached lists was completed by Friday evening, March 25, 1977.

5. I spoke with Lieutenant Paul Brennan, counsel for defendants, at 5:00 P.M. on March 25 and informed him that our data would be available within the next two hours. I attempted to deliver this material to Lieutenant Brennan, as agreed, at 6:15 that evening but was unable to do so due to the fact that he had left the appointed place. I again attempted to deliver this information to the NYCPD on Saturday, March 26th, but was unable to do so because the Department would not accept the package. I made these efforts to deliver this information to Lieutenant Brennan in order to give defendants maximum opportunity to review our data and the lists which we developed from it. When I explained this to Lieutenant Brennan on Friday afternoon, he indicated that if he received the information Monday morning he would have sufficient time to review it. I nonetheless made every effort to deliver the material as early as possible.

Affidavit of Sara E. Steinbock Read In Support of Plaintiff's Proposed Order

6. The method used by plaintiffs to determine the reordered constructive seniority dates is detailed below. Plaintiffs were given access to the certification cards of police officers who had passed the written entry examination. These cards contained information on the raw score on the examination from which the police officer was appointed as well as whether he was a veteran or trainee at the time of appointment. Plaintiffs had previously reviewed computer lists in the Department of Personnel which indicated the examinations passed and failed by members of the class. Plaintiffs were also given information from which the median appointment date for each examination could be determined.

7. Plaintiffs' first step was to identify the members of the plaintiff class on the master computer sheet of all police officers on layoff. The master computer sheets (enclosed) indicate the police officer's date of appointment, date of birth, and the number and date of the examination from which he was appointed.

8. Plaintiffs then pulled the certification card for each member of the plaintiff class in order to determine (a) the raw score received on the examination, (b) his actual appointment date (which was in some cases different from the appointment date indicated on the computer sheet) and (c) whether the individual was a veteran or trainee.

9. The median raw score of those who passed each examination* was calculated. The median appointment

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*Both plaintiffs and defendants agree that examinations No. 7065, 8046, 8108, 9019, 9049, 9080, 9086 and 0013 have been held invalid by this Court's opinion of March 17, 1977. In addition, plaintiffs believe that examinations No. 7017 and 7046 have been held invalid by that opinion (discussed *infra*).

date of those with the median raw score was then determined. These figures are attached as Exhibit A hereto.

10. It was then determined which members of the plaintiff class had scored below the median as determined above for the exam from which they were appointed. Each class member who scored below the median was given the median test score and a median appointment date for that examination. Class members who had been trainees were given the constructive appointment dates of trainees for that examination and class members who were veterans were given veteran's credit in determining their constructive appointment dates.

11. Each class member whose constructive appointment date was prior to April 1, 1971 was included on the list attached as Exhibit B hereto.* That list includes class members who failed or scored below the median on examinations 7065 and 8046, both of which had median appointment dates prior to April 1, 1971. Class members whose constructive appointment dates preceded April 1, 1971 by virtue of veterans credit or because they were trainees were also included on the list. The list also includes plaintiff Oswaldo Perez, who passed trainee examination 8108 but was rejected because of the height requirement. It is plaintiffs' position that each person on the list attached as Exhibit B should be afforded the opportunity to return to the NYCPD in the rehirings this week.

12. In addition to the class members who should be included in the next rehirings due to the constructive seniority dates as determined above, plaintiffs believe that

*It is plaintiffs' understanding that the cutoff appointment date for the upcoming rehirings is April 1, 1971, i.e., that those police officers with appointment dates prior to April 1, 1971 will be rehired on March 31 and April 1.

all class members who failed examinations 7017 and 7046 should be included in rehirings on March 31 and April 1. Plaintiffs have listed these class members separately in Exhibit C attached hereto. Defendants did not agree that these examinations were within the scope of Your Honor's Opinion ("opinion") of March 17, 1977. It is plaintiffs' understanding that examinations 7017 and 7046, which were at issue in Guardians I and therefore within the ambit of the Rand study, were found discriminatory by the opinion.

13. The opinion found that the Rand study (enclosed) was sufficient to establish a prima facie case of discrimination (opinion, page 22). In the opinion, Your Honor notes that the Rand report specifically analyzed examination #8046, the earliest examination with an eligibility list still in use, and examination #0013, the latest examination then in use, although Guardians I, which prompted the Rand study, challenged all entry examinations then in use (opinion, page 18).

14. Both parties to Guardians I were aware that these were the only examinations to be studied (opinion, page 18). Because of the similarity of the results of these two examinations, Rand concluded that the disparate statistical impact found in their study was "most likely typical of the pattern for all recent Civil Service Patrolman's examinations" (opinion, page 19). In the opinion, Your Honor notes that plaintiffs asserted additional evidence to support their claims of discriminatory impact, but finds that the Rand report is sufficient to shift the burden of showing job-relatedness to defendants (opinion, pages 12-20).

Affidavit of Sara E. Steinbock Read In
Support of Plaintiff's Proposed Order

15. Plaintiffs believe that the findings of the Rand report are applicable to all of the entry level examinations then pending and challenged in Guardians I, including examinations 7017 and 7046. In addition, plaintiffs wish to point to further evidence of discriminatory impact of examination 7046 presented at the hearing.

16. Plaintiffs' Exhibt No. 17 (enclosed) is a Department of Personnel study of entry level examination #7046. That study found a statistical discriminatory impact consistent with the Rand findings (Plaintiffs' Post-trial Memorandum of Law, page 20). Plaintiffs also introduced as Exhibit 18 (enclosed) a Department of Personnel study of examinations 9080 and 9081 which found discriminatory impact similar to that found in Rand and in the Department of Personnel study of examination #7046 (Pl. Memo, pages 22-23).

17. The layoffs which began on June 30, 1975 did not reach back to police officers who had passed examinations 7017 and 7046. Had the members of plaintiff class passed those examinations they never would have been laid off. It is, therefore, especially fair that the relief ordered by this Court include class members who took and failed those examinations.

18. On another list, attached as Exhibit D hereto, plaintiffs indicate those class members who failed examinations 8108, 9019, 9049 and 9080. These individuals would have a constructive seniority date prior to April 1, 1971 if they were veterans or if they were trainees. However, because the lists of those who failed examinations does not indicate this information, it is unknown at this time whether these

individuals were veterans or trainees. Further information must be gathered to determine the accurate constructive seniority dates for these class members. Plaintiffs believe that this information should be relatively simple to gather.

19. Plaintiffs recognize that the lists provided herewith may not work complete justice for the members of the plaintiff class. For example, the data which we were able to compile does not indicate plaintiffs who may have passed an examination prior to the examination from which he was appointed. Also, plaintiffs who passed an examination but were rejected because of the height requirement could not be identified from the data which we were given. These problems should not, however, impair immediate relief for those class members who can be easily identified.

20. Plaintiffs have labored long and hard to construct relief for class members who have been discriminated against. We have indicated to the Court and to defendants the methods and procedures used to construct this relief. Wherever there was a question regarding an individual, as indicated by the information available to us, this was so indicated on the lists attached.

21. Plaintiffs have worked around the clock to gather the information presented herein. Defendants have provided no assistance although ordered by the Court to do so. The relief proposed by plaintiffs is consistent with that stipulated to by the parties in Acha v. Beame, and that ordered by the Second Circuit in Chance v. Board of Examiners.

22. The hirings which take place this week are the only clear opportunities for remedying the discrimination

Affidavit of Sara E. Steinbock Read In
Support of Plaintiff's Proposed Order

found by this Court. Plaintiffs, who have been laid off for almost two years, should now be allowed to return to work to begin to make them whole for the discrimination which they suffered in the past.

Sara E. Steinbock
Sara E. Steinbock

Sworn to before me this
28th day of March, 1977

Herbert W. Brauer

HERBERT W. BRAUER
Notary Public, State of New York
No. 31-5427285
Qualified in New York County
Commission Expires March 30, 1978

Exhibit A - Median Raw Score and Appointment Date

Test	Median Raw Score Of Those Who Passed Test	Median Appointment Date Of Those With Raw Score	
		Patrolman	Trainee
7065	91	3-14-69	8-30-68
8046	87	6-30-69	1-30-70
8108	85	3-26-73	1-30-70
9019	86	6-25-73	No Trainee
9049	84	8-31-73	No Trainee
9080	84	10-1-73	5-8-70
9081*	85	7-30-73	No Trainee
0013	88	11-19-73	———

*Women Only

EXHIBIT A

Exhibit B - Appointees with Appointment Dates
Prior To April 1, 1971

94 people

Constructive Appointment Dates Prior To
April 1, 1971

Name	Code No.	Exam
Richard A. Lomax	2267.00 70210	7065 - below median
Julio E. Vigo	2268.00 70210	" " "
Julius C. Brown	2270.00 70210	" " "
Gabriel R. Lopez	2273.00 70210	" " "
Lionel A. Simmonds	2279.00 70210	" " " " (also failed 7017)
David A. Coleman	2310.00 70210	7065 - below median
John Williams, Jr.	2158.00 70210	8046 " "
Rodolfo V. Stevens	2160.00 70210	" " "
Delroy A. Barnes		8046 - failed
Wilbert Bishop		8046 - failed
Michael Boylan		7065 - failed
Wilmer Cox, Jr.		7065 - failed
Alan Davis		7065 - failed
Wilbert Davis		8046 - failed
Thomas F. Harris, Jr.		7065 - failed
George Jenkins		7065 - failed
John A. Leslie, Jr.		8046 - failed
Gregory L. Martin		7065 - failed
Willie K. Smith		7065 - failed
Felix Correa		7065 - failed
Luis Davila		7065 - failed ?
Jose Gonzalez		7065 - failed ?
Luis Lopez		7065 - failed
Angel R. Padilla		7065 - failed
Israel Robles		7065 - failed

EXHIBIT B

Exhibit B - Appointees with Appointment Dates Prior To April 1, 1971

Code No.	Name	Exam	Status
228	David McCoy	9080	DV*
229	Hedxan Quinones	9080	V**
281	William Stanback, Jr.	9080	DV
742	Lorenzo Almonte	9080	DV
761	Donald J. Thompson	9019	V
1203	Charles Johnson	9080	V
1421	Reginald Williams	9080	V
1444	Frederick Lewis	9080	V
1545	Deidre Scales	9081	DV
1839	Richard Wilson	9081	V
1849	George E. Fourcell	9081	V
1853	Jose A. Gonzalez	9081	DV
1855	Ulysses Tabb	9049	V
2212	Samuel L. Brown	8108	V
2422	Kenneth D. Reid	9019	V
2434	Luis Lopez	9080	V
2435	Linda A. Tyler	9081	V
2436	Alfonso J. Hovington	9049	V
2520	John Kittrell	9080	V
2521	Felix G. Santos	9080	V
2539	William Freeman	9080	V
2548	Robert R. Locklear	9019	V
2655	James Atkinson	9080	V
2665	Jerome Geiger	9049	V
2687	Raymond Rodriguez	9049	V
2727	Anthony Rivera	9080	V

* Disabled Veteran

** Veteran

Exhibit B - Appointees with Appointment Pates
Prior To April 1, 1971

Code No.	Name	Exam	Status
2731	George Howard	9080	V
2733	Otis Adams	9080	V
2734	Robert Sepulveda	9080	V
2748	Felipe Hernandez	9049	V
2750	Alfred W. Bland	9019	V
2751	James N. Whittington	9019	V
2844	Floyd Williams	9080	V
2848	Rigoberto Garzona ?	9080	V
2854	Mordecai Dixon	9080	V
2866	Edwin Cruz	9080	V

Exhibit B - Appointees with Appointment Pates Prior To April 1, 1971

Trainees

Code #	Name (birthdate)	Exam	Status
259	Oswaldo Perez (10/15/50)	8108	Trainee
569	Adrian D. Merrick (1/11/52)	8108	Trainee
2097	Peter M. Ruiz (6/18/50)	8108	Trainee
? 56	Floyd Coor (12/5/51)	9080	Trainee
556	Alfonso Cruz (3/20/51)	9080	Trainee
749	Vincent Wilds (1/22/53)	9080	Trainee
751	Edgar Santiago (?)	9080	Trainee (?)
947	Louis Carr (12/1/52)	9080	Trainee
953	Benjamin Hernandez (12/3/49)	9080	Trainee
1056	Renee Williams (1/3/50)	9080	Trainee
1059	Felix Perez (8/12/50)	9080	Trainee
1215	Louis Galorza (4/26/52)	9080	Trainee
1222	William Parker (8/12/50)	9080	Trainee
1235	Michael Gomez, Jr. (1/24/52)	9080	Trainee
1414	Raymond Howard (10/8/50)	9080	Trainee
1518	Philip Frances (12/3/51)	9080	Trainee
1531	Gregory Martin (2/2/52)	9080	Trainee
1553	Richard Morales (8/14/52)	9080	Trainee
2841	Livio Rosario (9/7/52)	9080	Trainee
2855	Wilmer Cox, Jr. (7/8/49)	9080	Trainee
951	Wilma Wilson (10/24/49)	9081	Trainee
955	Patricia Johnson (10/3/50)	9081	Trainee
1078	Maria Zapata (9/13/50)	9081	Trainee
1213	Pamela Daly (4/27/50)	9081	Trainee
1428	Olivia Jones (5/8/50)	9081	Trainee
1522	Gwendolyn Allen (?)	9081	Trainee (?)
1545	Deidre Scales (6/24/49)	9081	Trainee & DU

Exhibit B - Appointees with Appointment Pates Prior To April 1, 1971

Code #	Name (birthdate)	Exam	Status
1536	Mary Bembry (4/30/??)	9081	Trainee
1576	Mary Scott (5/29/49)	9081	Trainee
1787	Annette G. Spellen (10/25/49)	9081	Trainee
2267	Richard A. Lomax (4/11/49)	7065	Trainee
2273	Gabriel R. Lopez (1/31/50)	7065	Trainee
	Oswaldo Perez	8108	Trainee (leyht

Exhibit C - Class Members Who Failed Exams 7017, 7046

50 people

Class Members Who Failed Exams 7017, 7046

Name	Exam Failed
James L. Alleyne	7046
Charles E. Black	7017
Jerry D. Blackshear	7046
John J. Brooks	7046
Charles H. Brown	7017
Thomas S. Brown	7046
David A. Coleman	7046
Eisenhower Coleman	7046
John J. Daley	7046
Melvin Davis	7017
Edward Drew	7017
Roma Drummer	7017
Curry I. Dunn	7017
Therone J. Eugene	7017
Aaron L. Evans	7017
Clyde F. Frant	7017
Robert L. House	7046
James Jackson	7017 (?)
James L. Jeffers	7017
Ben Judge, Jr.	7017 (?)
Raymond Kelly	7017
Clinton Long	7046
Bruce Meyers	7046
Lionel M. Simmond	7017
Ervin Smith	7017 (?)
Raymond L. Steptoe	7017
Richard Thompson	7017

EXHIBIT C

Exhibit C - Class Members Who Failed Exams 7017, 7046

Name	Exam Failed
Cleo Toon, Jr.	7046
C. J. Washington	7046 (?)
J. H. Worrell	7017
Hector S. Carrion	7017
James Delvalle, Jr.	7046
Richard A. Diaz	7017
Edward Dumont	7017
Thomas Fernandez	7017
Louis Figueroa	7017
Jose Gonzalez	7046
F. Hernandez, Jr.	7046
R. A. Hernandez	7017 (?)
Wilson LaSalle	7017
David Luquis	7017
Hector Otero	7017
Joel Pacheco	7046
Carlos Pagan	7017 (?)
Philip Robles	7017
Eugene Rodriques	7017
Ramon Rodriquez	7017 (?) 7046 (?)
Raul F. Rodriquez	7017 (?)
Jose E. Velasquez	7017
Neftali Villanueva	7017

Exhibit D - Class Members Who Failed Exams 8018, 8108, 9019, 9049, 9080.

66 People

Class Members Who Failed Exams 8018, 8108, 9019, 9049, 9080 -- Must Determine If Veterans or Trainees in Order to Determine Constructive Appointment Date

Name	Exam Failed
Sammie Bell	9049
Ernie A. Benjamin	8108
Alfred N. Bland	8018
Larry Blue	9080
Kevin G. Boyce	8018
Dorse G. Bloedus	9019
Jeremiah Brooks	8018
Louis K. Carr	8108
James O. Clayton	9049
Gerald W. Cripper	9046
Thomas Davis	9019
Lexie T. Dumas	9080
Joseph Edwards	9049
Bruce Ervin	9080
Harvey Ervin	9019
David T. Evans	8108
Critt Everett	8018
Arthur L. Freeman	9080
William Freeman	8108
Willie H. Freeman	8018
Lawrence W. Fulton	9019
Luke L. Gibson	8108
Marvin J. Gibson	8018
Henry V. Hasell, Jr.	9049
James Hicks	8108

EXHIBIT D

Exhibit D - Class Members Who Failed Exams
8018, 8108, 9019, 9049, 9080

Name	Exam Failed
Leonard F. Holmes	9049
Raymond Howard	8108
William Jenkins	8108 (?)
Edward Johnson	8018
James Samuels	9019 (?)
Richard L. Sica	9019 (?)
Walter W. Smith	8018 (?)
James T. Stevens, Jr.	8018
Clarence H. Taliaferro	8108
James V. W. Taylor	8108
Mary L. Washington	9049 (?)
Clarice Williams	8046 (?)
Floyd A. Williams	9049
John Williams, Jr.	8108
R. J. Williams	8108 (?)
Richard Wilson	8108
Michael V. Wynn	8018
Jose Agron, Jr.	9019
Lorenzo A. Almonte	9019
E. A. Castillo	8108
Herbert Colon	9049
Edwin Cruz	8018
Jamie Felix	9080
Juan Garcia	9019
Rogoberto Garzona	9049
Benjamin V. Lopez	9049
Hector Lopez	9080
Raul Maisonet, Jr.	8018
Ferdinand Martinez	8046

Exhibit D - Class Members Who Failed Exams
8018, 8108, 9019, 9049, 9080

Name	Exam Failed
Alexander Nunez	8108
Ivan Palma	8046
Frank Perez	9080
Roberto L. Rivera	7046
Julio Rodriquez	8046 (?) 9019 (?)
Jorge L. Rubero	8108
Peter M. Ruiz	7046
Louis E. Sanchez, Jr.	9049
Rafael Santiago, Jr.	9049
William Santiago	9019
Louis P. Torrellas	8108
Jose A. Tioche	8046

Affidavit of Michael J. Codd Read In Opposition to T.R.O.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION, et al., Plaintiffs, -against- CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al., Defendants.	AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AN INJUNCTION 76 Civ. 1982 (R.L.C.)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MICHAEL J. CODD, being duly sworn, deposes and says:

1. I am the Police Commissioner, New York City Police Department and having personal knowledge of the facts as set forth hereinafter, submit this affidavit in opposition to the plaintiffs' application to enjoin the hiring of sixty (60) provisional employees under a one-year grant awarded the New York City Police Department by the Law Enforcement Assistance Administration ("LEAA").

2. The Police Department due to the hiring freeze imposed by the Mayor has not hired any police officers since June 30, 1975, with the exception of 205 officers hired under a federal grant on or about April 1, 1976. Additionally, the Department was required to accumulate vacancies through attrition for fiscal year 1975-1976 totaling 1,600 police

officers. On June 30, 1975, 5,034 police officers were laid off. Of these approximately 2,000 were rehired, so that to date nearly 3,000 officers remain on laid-off status. The Department's strength on June 30, 1975 consisted of 30,313 active uniform officers out of a total authorized strength of 35,219. The force has been reduced through lay-offs and attrition to 26,181 active members of the uniform force at the present time.

3. For the fiscal year 1976-1977 there is no provision in the budget for the Police Department for filling vacancies. Moreover, the Department must realize an attrition rate of 1,395 during 1976-1977 to comply with the budgetary reductions imposed by the Mayor and the New York State Emergency Financial Control Board.

4. The drastic effect of these severe reductions on the number of police officers on the force has sorely tested the ability of the Department to provide the level of police services to which the people of the City of New York are justly entitled.

5. The funds made available through the Law Enforcement Assistance Administration will enable the Department to rehire sixty (60) experienced officers who require minimal retraining and to provide immediate service where it is most urgently needed. The grant program is intended to combat street crime by establishing experimental anti-crime units in certain areas of the City where the

incidence of street crime is greatest. The availability of the 60 officers will permit us to undertake this important project without sapping the existing strength at the precinct level.

6. Additionally, the seasonal increase in demands for police service anticipated at this time makes our needs for personnel even more urgent. To foreclose the opportunity to supplement our uniform force by even 60 people would be unconscionable.

7. My letter to the laid-off officers and the terms and conditions of temporary employment apprises the rehired officers that their rights to employment under this grant are not inviolate and that this litigation and Acha v. Beame (75 Civ. 3128), may determine that other laid-off officers have better rights to employment. The letters are scheduled to be mailed on July 8, 1976, with responses to be received on or before July 13, 1976. Re-hiring will begin on July 19, 1976. (Annexed hereto as Exhibit A is my letter of July 8, 1976 and the terms and conditions of temporary employment.)

8. It was with this kind of stipulation of provisional employment, agreed to by the Acha plaintiffs, that 205 officers were hired in April, 1976 under a Title X grant. I believe that this notice procedure fairly protects the rights of all concerned and should be approved by the Court here.

9. There is of course the additional factor that re-ordering the preferred list for minority individuals, if that relief is ultimately awarded here, must necessarily be coordinated with the re-ordering sought to be effected in Acha. If rehiring is stayed pending the completion of the re-ordering procedure, officers who have been unemployed for over a year must continue to suffer the unnecessary hardship of extended unemployment. There is no justification for such delay where the hardship to both the City of New York and unemployed officers far outweighs the hardship to the plaintiffs, whose entitlement to re-adjusted seniority has not been determined.

10. For all these reasons and particularly because the critical need for additional police officers on the streets of the City of New York can not be over-emphasized; I urge this Court to deny the application for an injunction against re-hiring of police officers and to permit the Department to supplement the police force under the grant while the funds are available.

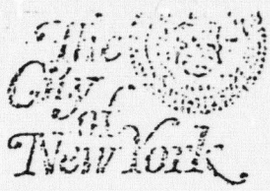
MICHAEL J. CODD

Sworn to before me this

day of July, 1[illegible]

Notary Public

Exhibit A -Letter Regarding Rehiring and Terms of Employment



POLICE DEPARTMENT

NEW YORK, N. Y. 10038

July , 1976

Dear Officer:

As a Police Officer, who was laid off due to the city's financial crisis, you are eligible for federally funded employment under a grant by the Law Enforcement Assistance Administration (LEAA) for the position of Police Officer, Anti-Crime Experiment (ACE).

In order to qualify for reinstatment, you must satisfy the following requirements:

1. Pass a qualifying medical examination.

2. Pass a supplementary character investigation.

3. Report to the Press Room, 2nd Floor, 1 Police Plaza, at 0800 hours, July 19, 1976, for processing.

This employment is considered to be a provisional appointment. Whether you accept this position or not, you will remain on the Preferred List and be eligible for permanent rehire should budgetary conditions allow. Failure to appear at the prescribed time will disqualify you from consideration for this position. You are requested to make your intentions known by contacting the Employment Division, at telephone number 374-6817, by Wednesday, July 14, 1976.

Applicants for the position of Police Officer (ACE) will be processed in Preferred List order, and appointment will be subject to certain Terms and Conditions of Temporary Employment to be executed by each applicant prior to acceptance of the position (copy attached for your information).

Sincerely,

Michael J. Codd
POLICE COMMISSIONER

em

Exhibit A -Letter Regarding Rehiring and Terms of Employment

POLICE DEPARTMENT
CITY OF NEW YORK

TERMS AND CONDITIONS FOR TEMPORARY EMPLOYMENT

I, the undersigned, have been informed and I fully understand that I am accepting a provisional appointment at this time subject to the following additional conditions:

This is a temporary position funded by a Federal Grant for a period of approximately one year and subject to the terms and conditions of that grant.

I understand that during this employment I will be subject to periodic transfer to various commands in order to accomplish the aims of the grant.

I am subject to future lay-off at anytime due to budgetary reductions or replacement by a Police Officer with greater seniority.

I am subject to future lay-off at anytime due to judicial decisions arising out of pending litigations in federal court which may result in the award to litigants of employment rights superior to mine.

This appointment is subject to a supplementary character investigation and qualifying medical examination.

I accept employment at this time with full knowledge of the aforementioned terms and conditions.

DATE

SIGNATURE

TAX NUMBER

WITNESS

Order Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,	:	Civil Action 76 Civ. 1982 (RLC)
Plaintiffs,	:	
-against-	:	ORDER
CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,	:	
Defendants.	:	

- x

WHEREAS, a hearing on plaintiffs' motion for a preliminary injunction having been had and the Court having made findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) in an opinion dated March 17, 1977 holding that the practices of the New York City Police Department ("NYCPD") in connection with the laying off and recalling of police officers violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000(e) et seq.; and

WHEREAS, the Court is aware that defendants presently intend to recall and rehire on March 31, 1977 and thereafter a significant number of NYCPD police

officers in reliance upon discriminatory seniority lists, examinations and height requirements promulgated by the defendants; and

WHEREAS, plaintiffs have moved to have this case certified as a class action pursuant to Fed. R. Civ. P. 23; and

WHEREAS, the Court finds that the class as defined below will satisfy the requirements of Fed. R. Civ. P. 23(a) and 23(b)(2) for the reasons set forth in the Court's opinion dated March 17, 1977, it is

ORDERED that:

1. The class shall consist of all those black and Hispanic New York City police officers whose seniority is lower than it would otherwise be but for the discriminatory practices of defendants.

2. All members of the class who were subject to layoffs in June 1975 shall be given constructive seniority dates which shall be the earlier of the following:

(a) the candidate's actual seniority date; or

(b) the median date of appointment as determined by the median score of the earliest examination which the class member took, i.e., the date by which one-half of said appointees were appointed.

3. Class members discriminated against by the height requirement shall be given a constructive seniority date which shall be the earliest of the following:

Order Appealed From

(a) the date they would have been appointed but for the discrimination caused by the existence of the height requirement at the time of the first examination they took; or

(b) the median date of appointment as determined by the median score of the earliest examination they would have taken but for the height requirement; or

(c) the date they would be given pursuant to the reordering set forth in 2(a) and 2(b) above.

4. The constructive seniority dates for members of the plaintiff class having been determined in accordance with paragraphs 2 and 3 above, class members indicated on the lists attached hereto shall be afforded the opportunity to return to employment as police officers in the NYCPD in the NYCPD rehirings on March 31, 1977 and April 1, 1977. All police officers rehired on the above dates shall be informed that their employment is subject to the outcome of this litigation.

5. In the event that defendants do not include the police officers whose names are annexed hereto in the NYCPD rehirings on March 31, 1977, the defendants, their officers, agents, servants, employees and attorneys are preliminarily enjoined from laying off or temporarily or permanently recalling any police officers. This injunction will remain in effect until the preferred lists in the NYCPD are reordered to accord plaintiffs and members of the class the seniority

Order Appealed From

that they would have had but for defendants' discriminatory practices.

6. The parties are directed to confer with a view to submitting to the Court a proposal for a final order and decree herein; those discussions shall include consideration of the following matters:

(a) "back" and "front" pay for members of the class;

(b) other possible incidents of revised seniority for members of the class;

(c) the structuring of future examinations, including consideration of promulgating new examinations on a qualifying rather than a ranked basis;

(d) the use of lists promulgated on the basis of the 1973 entry level examination; and

(e) attorneys' fees.

The parties shall submit their joint or, if necessary, separate proposals for a final decree and order within thirty days after the date of this order.

7. The interim relief granted herein shall be without prejudice to whatever rights members of the class may have as adjudicated in a final order and decree.

Order Appealed From

8. The Court remains jurisdiction for such period as is necessary to supervise this order and further proceedings herein and to determine the reasonable value of plaintiffs' attorneys' services.

Dated: New York, New York
March 28, 1977

U.S.D.J.

Notice of Appeal to U.S.C.A. 2nd Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., et al.,

Plaintiffs,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, et al.,

Defendants.

---x

NOTICE OF APPEAL

76 Civ. 1982
(R.L.C.)

S I R S :

NOTICE IS HEREBY GIVEN that defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered therein on March 18, 1977, which enjoins the permanent hiring of any New York City Police Officers until the rights of the plaintiffs to employment is adjudicated.

Dated: New York, New York
March 18, 1977

W. BERNARD RICHLAND
Corporation Counsel
Attorney for the Defendants
Office and P. O. Address:
Municipal Building
New York, N. Y. 10007.

By Rosemary Carroll
ROSEMARY CARROLL
Of Counsel

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Attn: Sara Steinboch, Esq.
Attorney for Plaintiffs